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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

~~No. A-54~~

NEWARK TEACHERS UNION, etc., *et al.*,
Petitioners,

vs.

THE BOARD OF EDUCATION OF NEWARK, etc.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Your petitioners, a local union and 186 individuals (including 183 members of the union, one non-member teacher, one retired teacher and one local college instructor) who have each been sentenced to jail for periods ranging from 10 days to three months in addition to fines, respectfully pray that a writ of certiorari issue to review the judgments and opinions of the New Jersey

Superior Court, Appellate Division, entered in this proceeding on April 5, 1971.

Opinions Below

The Supreme Court of New Jersey acted in this matter on J ly 7, 1971 denying a review from two decisions of the Appellate Division of the Superior Court of New Jersey which were rendered on April 5, 1971 (copies attached as Appendicies A and B). (Only one opinion is reported, 114 N. J. Super. 306.) Those decisions (consolidated for purposes of thi- proceeding) affirmed convictions of contempt against each of the petitioners and directed that jail sentences be served commencing as of July 12, 1971. The New Jersey Supreme Court, however, by its order of July 7, 1971 (copy attached as Appendix C) stayed the execution of those jail sentences until August 2, 1971 so as to permit this Court to pass upon an application for a stay pending the filing of the petition for a writ of certiorari. On July 23, 1971, Mr. Justice Brennan stayed execution of the judgments and mandates of the Appellate Division (copy of order attached as Appendix D). Such order, requiring timely filing of this petition, stays the judgments and mandates until the Court either decides to deny the petition, or, if the writ is granted, until a determination of the merits of the full case.

Jurisdiction

The judgments of the New Jersey Superior Court, Appellate Division, were entered on April 5, 1971, affirming petitioner's convictions in summary criminal contempt proceedings conducted by the Chancery Division of the New Jersey Superior Court. A timely petition for cer-

tification to the New Jersey Supreme Court was filed. Such petition was denied on July 7, 1971. This petition for certiorari was filed within 90 days of that date, and on or before the date required by the above-referenced order of Mr. Justice Brennan. This Court's jurisdiction is invoked under 28 U.S.C., § 1257(3).

Questions Presented

I. Whether the broad and absolute common law rule of New Jersey, under which its courts issue injunctions restraining "striking", picketing and non-picketing forms of supportive communication relating to public employee "strikes", without regard to a) essentiality of the services, b) details of the particular conflicts, including questions with respect to the arbitrariness or lack of good faith of the public officials involved, and c) with the broadest prohibition of any communication supportive of the group action, violates this Court's requirements of precision and narrowness of regulation in the First Amendment area.

II. Whether the jailing of rank and file members of the union for nonviolent concerted acts of the union violates constitutional rights of association and is a regulation of First Amendment conduct far more drastic than the state's regulatory interest justifies.

III. Whether the restraint *sub judice,* which prohibited a vast range of activity (including such acts as "indirectly" "sanctioning" an "impediment to work"), abridges First Amendment rights, being overbroad and vague, both in its language and its impact.

IV. Whether the Chancery Division lacked jurisdiction to issue the restraining order, operating as it does in the

First Amendment area, because no effort was made to give notice of impending issuance to defendants, thus denying due process of law as required by the Fourteenth Amendment.

V. Whether the New Jersey law and process here at issue violate the due process clause of the Fourteenth Amendment by failing to provide adequate procedural safeguards in the prosecution of conduct declared "illegal" pursuant to New Jersey's common law prohibition against public employee strikes and concerted activity, including failure to afford any possibility of defense even by persons not parties to the injunction proceeding.

VI. Whether the Appellate Division's application to this case of this Court's opinion in *Walker* v. *City of Birmingham* as to persons not named in the injunction proceedings was misconceived, thus denying petitioners due process of law as per the Fourteenth Amendment.

Constitutional Provisions Involved

Petitioners rely on the First and Fourteenth Amendments to the United States Constitution.

Statement of the Case

The contempt proceedings here at issue grew out of the 1970 labor dispute between the defendant union and the Board of Education of Newark. An existing collective bargaining contract was expiring as of January 31, 1970 and the parties had been in negotiations concerning a renewal thereof. An *ex parte* injunction was drafted by the Board and issued, without modification, as an order of the Chancery Division by Judge Herbert on January

31. It appeared a strike was being considered by the union at a meeting the following day, to commence on February 2.

No notice, formal or otherwise, was given any defendant prior to the decree of the court, notwithstanding the provisions of New Jersey Rule 4:52-1(a) and notwithstanding the Board of Education had been informed at least from and after January 16 that the union wanted to strike if there was no settlement by January 31. The injunction, designed to restrain a spectrum of concerted activity by the union, 11 named officers (the only persons named as defendants), and unnamed and indeterminate individuals, is as follows:

> ORDERED, that the defendants, Newark Teachers Union, Local 481, American Federation of Teachers, A.F.L.-C.I.O., an unincorporated association, and the defendant New Jersey State Federation of Teachers, an unincorporated association, their respective members, officers, directors, committee members, employees, agents and representatives, Carol Graves, Frank Fiorito, Donald Nicholas, Bernie Nisenholz, John Palmieri, Betty Rufalo, Durecia Watley, Edward Gadson, Frank Volpe, William Puzak and Edward Tumin, individually and as officers of the Newark Teachers Union, Local 481, American Federation of Teachers, A.F.L.-C.I.O., and their respective agents and representatives, and all persons acting in behalf of or in concert or participation with the said defendants or the said members, officers, directors, committees, employees, agents and representatives, or any of them, are hereby restrained and enjoined from, directly or indirectly, or by any manner or means:

1. Causing, instigating, promoting, encouraging, sanctioning, authorizing, carrying on, participating in, fostering, continuing, lending support or assistance to or aiding or abetting any strike, sitdown, slowdown, work stoppage or other impediment to work, against the plaintiff or by any employee or employees of the plaintiff;

2. Picketing, congregating, parading, patrolling, loitering, gathering, or walking back and forth,—or causing, instigating, promoting, encouraging, sanctioning, intimidating, coercing, counselling or authorizing any person or persons to picket, congregate, parade, patrol, loiter or walk back and forth,—in front or in the vicinity of the public schools, buildings, grounds, playgrounds, yards, or premises of the plaintiff or operated or administered by the plaintiff, or in front of any buildings, grounds, playgrounds and premises on or at which any instructional or guidance program is conducted by plaintiff;

3. Interfering with, obstructing, impeding, or delaying, or attempting to interfere with, obstruct, impede or delay the plaintiff in the performance of any of its duties and functions or in the conduct of the Newark public school program; or interfering with, obstructing, impeding, intimidating, coercing or harassing, or attempting to interfere with, obstruct, impede, intimidate, coerce or harass, any person, firm or corporation in the performance of any duty, obligation, function, service or act for the plaintiff or in the fulfillment or performance of any commitment to or contract with the plaintiff relating to plaintiff's duties and func-

tions or to the conduct of the Newark public school program;

4. Doing or attempting to do any act to interfere with, obstruct, impede or delay, or tending to interfere with, obstruct, impede or delay deliveries of any goods, wares, merchandise, supplies, food, beverages, fuel, equipment or appartus to and for the plaintiff, or to and for any place at which plaintiff conducts a program or activity as part of the Newark public school program;

5. Doing or attempting to do or causing, instigating, encouraging, intimidating, coercing or counselling or attempting to cause, instigate, encourage, intimidate, coerce or counsel any person, firm or corporation to do any act to interfere with, obstruct, impede or delay, or tending to interfere with, obstruct, impede or delay any maintenance work, alterations, or repairs on or at any public schools, buildings, grounds, playgrounds, yards and premises of the plaintiff, or on or at any buildings, grounds, playgrounds, or premises where any instructional or guidance program is conducted by plaintiff;

6. Doing or attempting to do, or causing, instigating, encouraging, intimidating, coercing or counselling, or attempting to cause, instigate, encourage, intimidate, coerce or persuade any firm or corporation to do any act to interfere with, obstruct, impede or delay, or tending to interfere with, obstruct, impede or delay the construction of any building or addition to any building or any premises of the plaintiff;

> 7. Agreeing, conspiring, or combining to do any of the foregoing acts, or directly or indirectly accepting, arranging for, or soliciting from any source funds or other support for the doing of any of the foregoing acts mentioned in paragraphs "1" to "6", directly preceding the within paragraph "7."

On February 2 there was a strike by the defendant union pursuant to direction from its constituency. It is clear that the strike involved no violence or threat thereof, mass picketing or any coercive action whatsoever. Certain efforts were undertaken to make personal service on those named in the injunction but no service was made on any other persons. The injunction was posted on various bulletin boards and reprinted in newspapers. Beginning on February 4, the Board of Education initiated contempt proceedings, charging violation of the injunction. On that day and the following day, arrest orders were issued for six of the union leaders.

On February 6, the Chancery Division ordered the Essex County Prosecutor to investigate the strike. Thereafter, on February 10, the Chancery Division ordered the Essex County Sheriff to arrest those who violated the injunction. Arrests followed on February 11, 13, 17, 18, 19 and 20. These mass arrests were made at or near picketlines, many persons being arrested with warrants issued in blank. Non-teachers as well as teachers were arrested. Civil rights leader Bayard Rustin was charged with contempt as a result of addressing a union rally in Newark on February 8. Other union leaders (non-teachers) who picketed or spoke out in support of the strike were charged with contempt. One Mrs. Alice Saltman, a *retired* teacher, was arrested *and* convicted for

appearing near a school and picketing. One Miss Joan Stevens, a non-union striking teacher, was likewise arrested and convicted. One Mr. Jerry Meyer, an instructor at a local college and not a striker or union member, was also arrested and convicted. Almost 3,000 of the approximately 4,000 teachers in the Newark system supported the strike and did not work throughout its four-week duration (Tr., Mar. 16, 1970, 34-35). Other than the six officers prosecuted, the basis upon which the 186 individuals were selected for prosecution from among the 3,000 strikers appears to have been that they were at one point identified either "picketing or assembling and congregating outside the schools" (opinion of Appellate Division, NTU case, 4a).

Summary criminal contempt proceedings were conducted, with most trials involving stipulations. The union and 186 individuals were convicted. The latter now face, in the main, 10-day jail sentences. There were fines for all, ranging from a minimum of $200 to a fine of $40,000 for the union. Greater penalties were leveled at six union officers, some of whom have been sentenced to as much as three months in jail and fines of $500.

The sole proof in support of conviction was that the defendants had not worked (which was also true of some 3,000 others) and had engaged in picketing or congregating near schools.

Since the court granted the injunction *ex parte*, no consideration was then given to the issues in or causes of the strike. New Jersey law absolutely precludes consideration of "good motive" and circumstances either at the time of the application for an injunction of a public employee strike or upon the issue of contempt for violation thereof. *Board of Education, Borough of Union Beach* v.

NJEA, et al., 53 N. J. 29, 37, 40-41, 42 (1968). Nor did the court consider whether it might have drawn its injunction more narrowly. At the trial of the contempts, introduction of evidence bearing upon the conduct of each individual in relation to the issues in the strike was foreclosed by the court (*e.g.*, Tr., Feb. 16, 1970, 22). See also Tr., Feb. 24, 118.

How Federal Questions Were Presented

The federal questions herein presented were presented below. The Appellate Division review *sub judice* was *de novo*, pursuant to N.J.S.A. 2A:10-3 and R. 2:10-4. Hence, all issues were available in that court, whether raised in the Chancery Division or not. See *NTU* opinion at 12a and *Joan Stevens* opinion at 15a-16a.

At the trial level (Chancery Division of the New Jersey Superior Court) the three judges who presided over the several summary criminal contempt proceedings narrowed the scope of inquiry to "simply did the various defendants have notice of the order and, number two, did any of them violate the order." Tr., Feb. 16, 22. Thus, when testimony was sought relative to the good faith of the public employer, the typical reply of the trial court was "[i]t is not germane at all." Tr., Feb. 24, 118. See also, Tr., Feb. 18, 194. And when testimony was offered in mitigation to show the circumstances surrounding the contemptuous acts, the court replied, "It is not for this Court to evaluate the frustrations of the teachers. . . . I'm not concerned whether their cause is just or unjust." Tr., Feb. 24, 194; see also Tr., Feb. 24, 190-94; Tr., March 3, 337-45.

The foregoing reflects that neither the Chancery Division nor the Appellate Division of the Superior Court

could overturn the law as developed by the New Jersey Supreme Court, and the New Jersey Supreme Court's refusal to hear this case indicates that court's inalterable commitment to the absolute ban. Thus, the Appellate Division found that "[a] restraint against *an unlawful strike* and picketing in furtherance thereof was constitutionally permissible." (*Joan Stevens* opinion at 16a) (emphasis supplied). See also, Tr., Feb. 18, 37-39, 193.

The question of the propriety of jailing nonviolent rank and file strikers was argued at the trial level throughout the hearings, when sentences were about to be imposed. See, *e.g.*, Tr., Feb. 24, 190-92, 202; Tr., March 3, 342-45. Briefs to the Appellate Division by appellants in both of the cases here consolidated challenged the jail sentences (*NTU brief,* Point IV; *Joan Stevens* brief, Point V). The Appellate Division, in each instance, specifically rejected the argument (*NTU* opinion, 12a-13a; *Joan Stevens* opinion, 17a).

Questions of overbreadth and vagueness of the injunction were raised before the Appellate Division, and decided. First, in the *NTU* brief (Point II) it was asserted that certain named individuals were convicted of an act with which they had not been charged. In rebutting this allegation, the Appellate Division interpreted *all* supposedly illegal conduct "as part of a strike movement on the part of Local Union 481" or as indicating that defendants "aided and abetted in a strike." *NTU* opinion, 7a. The *Joan Stevens* brief (Points II and III) specifically raised the questions of overbreadth and vagueness of the injunction—allegations which were addressed and summarily dismissed in the Appellate Division opinion at 16a. See also, e.g., Tr., March 4, 272-73.

The absence of procedural safeguards was argued at the trial level, and briefed and decided above. See, *e.g.*,

NTU opinion at 5a (manner of arrest), at 6a-7a (proofs), and at 11a (notice of offense); *Joan Stevens* opinion at 15a-16a (notice of issuance of restraint), and at 16a-17a (procedural defects on face of injunction and manner of arrest); *NTU* brief, Points I and III; *Joan Stevens* brief, Points II, III and IV; see also, *e.g.*, Tr., Apr. 10, 7-10; Tr., Feb. 24, 202, 217; Tr., Feb. 18, 197-99; Tr., March 11, 32-34; Tr., March 9, 12; Tr., March 3, 261, 268.

The inapplicability of *Walker* v. *Birmingham* to these proceedings was argued in the *Joan Stevens* brief at Point IV, and decided adversely to appellant (*Joan Stevens* opinion at 16a).

The issue of failure to give notice of the issuance of the *ex parte* restraining order was inherent in Point II of the *Joan Stevens* brief, where it was argued that "Joan Stevens was not a party to the original proceeding in which the Restraining Order was issued" (at p. 17). Such defect was apparently focused on by the Appellate Division, and disregarded (*Joan Stevens* opinion at 15a).

The consolidated petition for certification to the New Jersey Supreme Court raised all the questions here presented.

REASONS FOR GRANTING THIS WRIT

I.

The decisions below, involving the mass jailing of rank and file members of a union for peaceful conduct, present a significant matter of first impression for this Court, having broad impact upon First Amendment rights of association, both in the public employee union context and beyond.

Petitioners believe that this is the first occasion where there has been presented to this Court the constitutional questions involved in the mass jailing of rank and file members of a union and their supporters for peaceful conduct, claimed to be in violation of an *ex parte* injunction of remarkably broad and speech-interdicting scope and issued in a proceeding in which they were not even parties. The issues arise in the context of a continuing debate over public employee strikes, a question which has challenged scholars,[1] government commissions,[2] and the

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[1] Burton and Krider, "The Role and Consequences of Strikes by Public Employees," 79 Yale L.J. 418 (1970); Wellington and Winter, "The Limits of Collective Bargaining in Public Employment," 78 Yale L. J. 1107 (1969); Wellington and Winter, "Structuring Collective Bargaining in Public Employment," 79 Yale L.J. 805 (1970); Kheel, "Strikes and Public Employment," 67 Mich. L. Rev. 931 (1969); Staudohar, "The Changing Role of the Injunction in Public Sector," Labor Law Journal 287 (May 1971).

[2] See Smith, "State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis," 67 Mich. L. Rev. 891 (1969).

courts.[3] In this debate, as will be shown, New Jersey has staked out an extreme position in which elementary constitutional principles have been sacrificed to an absolutist formulation limiting the rights of public employees, which will have impact not only on public employee unions but as well on other unions and, ultimately, in all areas of association.

Petitioners are aware that in a number of cases presented to this Court, petitions for writs of certiorari have been denied in cases involving contempt citations arising out of public employee strikes. Examination of each of those cases, however, makes clear that they involve convictions or fines against *union leaders* who were *named defendants*.[4] The decisions in those cases are ac-

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[3] Aside from the New Jersey cases cited in the Appellate Division decisions herein, note should be made of some of the following recent decisions: *School District for the City of Holland, Ottawa and Allegan Counties, Michigan* v. *Holland Education Association,* 380 Mich. 314, 157 N.W. 2d 206 (1968); *In re Berry,* 65 Cal. Rptr. 273 (1968); *Crestwood School District* v. *Crestwood Education Association.* 170 N.W. 2d 840 (1969); *City of New York* v. *DeLury,* 23 N.Y. 2d 175, 243 N.E. 2d 128 (1968), appeal dismissed, 394 U.S. 455 (1969); and see other lower court decisions referred to in Staudohar, *supra,* n. 1.

[4] *Cook County College Teachers Union* v. *Swenson,* 262 N.E. 2d 125 (Ill. App. Ct., 1970), cert. den., 39 U.S.L.W. 3518 (5/25/71); *Dade County Classroom Teachers Assn.* v. *Rubin,* 238 So. 2d 284 (Fla. S.Ct., 1970) (see also 217 So. 2d 293), cert. den., U.S. , 91 S. Ct. 569 (1971); *Anderson Federation of Teachers* v. *School City of Anderson,* 251 N.E. 2d 15 (Ind. S.Ct., 1969), reh. den., 254 N.E. 2d 324 (Ind. S.Ct., 1970), cert. den. 399 U.S. 928 (1970); *Shanker* v. *Rankin,* 25 N.Y. 2d 780 (1969) (see also, 295 N.Y.S. 2d 625), appeal dismissed, 396 U.S. 120 (1969); *City*

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cordingly well within the ambit of this Court's decision in *United States* v. *United Mine Workers,* 330 U. S. 258 (1947). But not since the days of the *Danbury Hatters* case (*Loewe* v. *Lawlor,* 208 U. S. 274 (1908)) has any court in this land adopted the technique of penalizing individual rank and file members of a union for their concerted peaceful activity as members of a union.

The *Hatters* case involved only a financial penalty against the individual members. Here the penalty is the most extreme form of deprivation of liberty: jailing. Aside from the fact that such a remedy "shocks the conscience",[5] it is clear that the course chosen by the New Jersey courts, as expounded in a series of cases culminating in this one, ignores major constitutional rights both of a procedural and a substantive nature.

This Court has shown acute awareness of the implications of penalizing rank and file members of a union for actions of the union itself. See *Atkinson* v. *Sinclair Refining Co.,* 370 U. S. 238 (1962), where the Court refused

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of New York v. *DeLury,* 23 N.Y. 2d 175 (1968), appeal dismissed, 394 U.S. 455 (1969), reh, den., 396 U.S. 872 (1969); *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostook R.R. Co.,* 380 F. 2d 570 (D.C. Cir., 1967), cert. den., 389 U.S. 327 (1967); *City of Detroit* v. *Div. 26 of Amalgamated Assn.,* 332 Mich. 237, 51 N.W. 2d 228 (1952), appeal dismissed, 344 U.S. 805, reh. den. 344 U.S. 882 (1952).

[5] Even those who advocate the need for developing a different set of rules for public employees' strikes than for the private sector emphasize the need to avoid sanctions "so harsh as to engender a feeling of revulsion in the community," Wellington and Winter, *supra,* n. 1, 79 Yale L.J. 805, 839 (1970).

to permit even union committeemen to be sued in damages for breach of a collective bargaining contract, insisting that the remedy was against the union. While of course the decision was based upon statute, the statute itself was based upon a recognition of the development of the institutional role of unions. See *Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 403 (1947). And the Court took occasion to refer to the "deeply felt congressional reaction against the *Danbury Hatters* case (*Loewe* v. *Lawlor,* 208 U. S. 274; *Lawlor* v. *Loewe,* 235 U. S. 522) and an expression of legislative determination that the aftermath (*Loewe* v. *Savings Bank of Danbury,* 236 F. 444 (C. A. 2)) of that decision was not to be permitted to recur." 370 U. S. at 248.

The chilling impact of the invocation of penalties against rank and file members of a union as applied in this particular case has far reaching consequences upon associational freedoms in all areas. Historically the "enjoining 'whomsoever' from engaging in 'whatsoever' totally paralyzed the union from any concerted action." Summers and Wellington, *Cases and Materials on Labor Law,* Mineola, New York, The Foundation Press, 1968, p. 187. That paralysis—or chill—will now be felt in all unions (and beyond) and thus poses an unconstitutional threat to rights of association. There is no "breathing space" for First Amendment freedoms in this scheme of jailing individuals for peaceful support of their union. *NAACP* v. *Button,* 371 U. S. 415, 433 (1963). Thus, even if a state may, consistent with the Constitution, prohibit public employee strikes, it has no power to fashion remedies which will effectively stop public employee unionism. New Jersey has clearly selected a penalty of jailing 186 rank and filers although it "has within its power

'less drastic' means of achieving [its] objective." *Aptheker* v. *Secretary of State,* 378 U. S. 500, 512-13 (1964).[6]

New Jersey is not the only state facing burgeoning public employee unionism and public employee strikes. But nobody—literally no authority and no court—has reacted as has New Jersey to structure the massive jailing of rank and file members, for it is obvious that this type of retreat to the *Cordwainers* case and its New Jersey counterpart, *State* v. *Donaldson,* 32 N. J. L. 151 (Sup. Ct., 1867), is a retreat not just from public employee strikes but from constitutionally protected public employee unionism. Cases commonly cited for the proposition that public employee strikes are illegal, do not involve the jailing of rank and filers for peaceful conduct.[7]

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[6] The question of "appropriate sanctions for violations of the no-strike policy" has been the subject of detailed consideration by governmental commissions in Connecticut, Minnesota, Rhode Island, New York, Michigan, Illinois, New Jersey, Pennsylvania, and Los Angeles. Analysis of all these reports establishes that—

"There was substantial accord that punitive sanctions directed at individual employees such as those embodied in New York's now-defunct Condon-Wadlin Law, or Michigan's former Hutchinson Act, are unworkable in any major strike situation." Smith, *supra,* n. 2, 67 Mich. L. Rev. at 911.

[7] Your petitioners have argued this proposition before. The Prosecutor has cited certain cases, presumably as precedent for the New Jersey approach. No case cited by the Prosecutor stands for the proposition that rank and file nonviolent strikers should be imprisoned. The following citations, with introductory page references to the Prosecutor's initial usage of them in his Brief in Opposition to Petitioners' Application for a Stay of Execution of Sentence, are offered:

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Independent of the more specific constitutional issues discussed below, your petitioners submit that the question of jailing 186 members of a union for their peaceful conduct as members of their union of itself merits review by this Court, in light of inevitable impact on employee rights and associational rights in all areas.

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Page 12: *New Jersey Turnpike Authority* v. *American Federation of State, County & Municipal Employees*, 83 N.J. Super. 289, 200 A. 2d 134 (Ch. Div., 1964) (declaratory judgment and injunctive relief sought to prevent Turnpike employees from striking; no criminal sanctions imposed); *Donevero* v. *Jersey City Incinerator Authority*, 75 N.J. Super. 217, 182 A. 2d 596 (Law Div., 1962), rev'd *sub nom. McAleer* v. *Jersey City Incinerator Authority*, 79 N.J. Super. 142, 190 A. 2d 891 (App. Div., 1963) (municipal employees struck and municipality refused to reinstate them; held, no just cause for dismissal shown; no criminal sanctions); *Norfolk Teachers' Assn.* v. *Board of Education*, 138 Conn. 269, 83 A. 2d 482 (1951) (declaratory judgment suit; held that public school teachers are not permitted to strike and that arbitration would be a proper way of solving disputes); *City of Los Angeles* v. *Los Angeles Bldg. & Central Trades Council*, 94 Cal. App. 2d 36, 210 p. 2d 305 (D.C. App., 1952), reaffirmed 109 Cal. App. 2d 81, 240 P. 2d 16 (D.C. App., 1952) (injunction against strike of governmental employees affirmed; not criminal action); *City of Manchester* v. *Manchester Teachers Guild*, 100 N.H. 507, 131 A. 2d 59 (1957) (injunction against striking teachers held to have been validly issued; no criminal penalties imposed); *City of Alcoa* v. *Int'l Brotherhood of Electrical Workers*, 203 Tenn. 12, 308 S.W. 2d 476 (1957) (injunction issued against striking city electrical employees held to have been valid; no criminal penalties involved); *City of Pawtucket* v. *Pawtucket Teachers' Alliance*, 87 R.I. 364, 141 A. 2d 624 (1958) (bill in equity to enjoin teachers from striking held properly issued; not criminal action); *Port of Seattle* v. *Int'l. Longshoremen's & W. U.*, 52 Wash. 2d 317, 324 P. 2d 1099 (1958) (injunction properly issued to restrain union and members from striking; no criminal penalties).

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II.

The decisions below present in sharp focus the question of the application of well-defined principles of constitutional law—those requiring precision and narrowness of regulation in the First Amendment area—to State efforts to regulate and control public employee union activity.

Beyond the unprecedented nature of the penalty, the overriding constitutional dilemma which this case brings into sharp focus is how state regulation of public em-

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Pages 20-21: *In re Buehrer,* 50 N.J. 501, 312-13 (1967) (fines, suspended sentences and probation); *In re Block,* 50 N.J. 494, 499 (1967) (officers sentenced); *Whippany Paperboard Co., Inc.* v. *Local 301,* 11 N.J. 153 (1952) (violence and threats of violence).

The following additional citations, with introductory page references to the Prosecutor's initial usage of them in his Brief in Opposition to Petition for Certification in the Supreme Court of New Jersey, are offered:

Page 20: *United States* v. *Brotherhood of Railroad Trainmen,* 95 F. Supp. 1019, 1020 (D.D.C., 1951) (fine imposed on union); *Harrison* v. *Terry Dairy Products Co.,* 287 S.W. 2d 473 (S. Ct. Ark., 1956) (suspended sentence); *Jones* v. *Lewis,* 35 N.W. 2d 891 (S. Ct. Iowa, 1949) (specific finding of violence); *Local 890, Int'l. Union of Mine, Mill & Smelter Workers* v. *New Jersey Zinc Co.,* 272 P. 2d 322 (S. Ct. N. Mex., 1954) (initially suspended sentences, which were ultimately revoked as to six named defendants who appear to be union leaders; see *Jencks* v. *Goforth,* 261 P. 2d 655); Fawick *Airfley Co.* v. *United Electrical, Radio & Machine Workers Local* 735, 92 N.E. 2d 436 (Ct. of App. Ohio, 1956 (evidence of violence).

ployee concerted activity is to be squared or balanced with certain well-defined constitutional principles which this Court has developed in the context of other associational activities. We submit that the starting point of discussion must be that state regulatory action in areas touching upon First Amendment activity must be demonstrably necessary, precise, not overbroad, and must comport with fundamental principles of due process.[8] "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U. S. 415, 448 (1963). Peaceful associational activity and peaceful communicational picketing is certainly within the area where "precision" is the "touchstone".

New Jersey, however, as evidenced by this case, has staked out a position in which it considers itself effectively freed of all constitutional restraint in dealing with

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[8] The cases where the Court has developed these concepts most clearly have emerged in the main from the pressure of organizational groupings seeking to correct racial injustices. *e.g.*, *NAACP* v. *Button*, 371 U.S. 415 (1963) *supra; Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960). But the source of constitutional principles is the same whether operating in the field of civil rights or in the area of labor relations. See *Brotherhood of Railway Trainmen* v. *Virginia*, 377 U.S. 1 (1964), *and United Transportation Union* v. *State Bar of Michigan*, 28 L.Ed. 2d. 339 (April 5, 1971); and see opinion of Warren, C.J., in *Walker* v. *Birmingham*, 388 U.S. 307, 330 (1967). Concern for the organization of working people was, after all, the prevailing context in which this Court first fashioned fundamental principles of associational rights and the rights of expression. See *Hague* v. *CIO*, 307 U.S. 496 (1939); *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

the regulation of group activity and strikes of public employees. (And, as is indicated in Point III, *infra,* the issue of the application of constitutional principles to public employee unionism is one of pressing national importance.)

New Jersey's position is, as stated earlier, one developed through common law and not by legislation. The New Jersey cases speak in absolutes in terms of the kind of public employees the strike ban encompasses. See, *e.g., Delaware River and Bay Authority* v. *International Organization etc.,* 45 N. J. 138, 146 (1965) (operators of ferry service); *N. J. Turnpike Authority* v. *American etc. Employees,* 83 N. J. Super. 389, 395 (Ch. Div., 1964) (toll collectors and maintenance employees of N. J. Turnpike Authority); *Donevero* v. *Jersey City Incinerator Authority,* 75 N. J. Super. 217, 222 (Law Div., 1962), reversed on other grounds, 79 N. J. Super. 142 (App. Div., 1963) (public incinerator employees). "When government undertakes itself to meet a need, it necessarily decides the public interest requires the service, and its employees cannot reverse or frustrate that decision by a concerted refusal to meet that need." *In re William Block,* 50 N. J. 494, 499 (1967).[9]

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[9] New Jersey has no answer to the following questions posed by Chief Justice DeBruler in his dissenting opinion in *Anderson Federation of Teachers* v. *School City of Anderson,* 251 N.E. 2d 15, 21 (Ind. Sup. Ct., 1970):

"Does the majority seriously believe that a strike by employees of municipal golf courses would result in anarchy? What of city parking lot attendants? What about janitors? What about referees at the high school football games?"

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A wide range of group activity involving concerted employee efforts is deemed to be a "strike" or, if not a strike, nevertheless prohibited. Thus, in *Board of Education, Borough of Union Beach* v. *NJEA, et al.*, 53 N. J. 25 (1968), the court enjoined collective resignation from employment plus the notification by the parent body to its members that the local had unacceptable working conditions and that members would be "sanctioned" if they accepted employment there. See 53 N. J. at 41, n. 2, par. (2). To the argument that the conduct did not amount to a strike, the New Jersey court responded:

> "The public demand for services which makes illegal a strike against government inveighs against any other concerted action designed to deny government the necessary manpower, whether by terminating existing employment in any mode or by obstructing access to the labor market." 53 N. J. at 37.

And, to leave no doubt as to the scope of conduct to be included within the sweep of its prohibition, the court continues:

> "So our criminal statute, N.J.S. 2A:98-1, provides in simple but pervasive terms that any two or more persons who conspired 'to commit any act' for

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The majority opinion in the Indiana court also ignored these questions of its Chief Justice. But Indiana has not yet in application extended a prohibition of public employee strikes to any and all public employees. New Jersey has done exactly that, as we show in the text. Moreover, the Indiana case did not involve contempt proceedings against rank and filers; it was the union as such that was proceeded against there.

> the obstruction of . . . the due administration of the laws' are guilty of a misdemeanor." 53 N. J. at 38.

Shades of the Philadelphia *Cordwainers* case!

It matters not what issues may have brought about the strike—how arbitrary or capricious the person or body exercising governmental power may have been or how meritorious and defensible was the action of the employees. Indeed, the New Jersey court has emphasized that any attempt to defend upon those grounds is but further proof of the guilt of parties charged with violation of the injunction. *In re William Brown, Jr.,* 50 N. J. 435, 437 (1967), presented a striking teacher's argument that he disfavored the strike but went along so as to maintain his position on the negotiating team and thus be able to influence return to work. The court said:

> "But the facts, indeed defendant's own testimony, show his violation of the order was willful. The real thrust of his appeal is that his motive was good. Good motive, of course, does not negate willfulness." 50 N. J. at 437.

Nor does New Jersey require the public employer to submit any proof to support its claim of irreparable injury. How different the New Jersey rule is from that of Michigan, which recognized the constitutional problem presented.

> "We here hold it is insufficient merely to show that a concert of prohibited action by public employees has taken place and that *ipso facto* such a showing justifies injunctive relief. We so hold because it is basically contrary to public policy in this State to

> issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace. . . . We further so hold because such an interpretation of the act would as before noted raise a serious constitutional question.
>
> "'We indicated earlier that we deal with a meager record. No testimony was taken on the hearing upon the application for the temporary injunction. Simply put, the only showing made to the chancellor was that if an injunction did not issue, the district's schools would not open staffed by teachers on the date scheduled for such opening. We hold such showing insufficient to have justified the exercise of the plenary power of equity by the force of injunction.'" *School District for City of Holland, Ottawa and Allegan Counties* v. *Holland Education Association*, 380 Mich. 314, 157 N. W. 2d 206, 210 (1968).

This, then, is the scope of New Jersey's common law in this area. This boundless common law, operating as it does in the First Amendment area, is unconstitutional because of its imprecision and broad sweep.

In this posture the New Jersey Supreme Court stands alone, adopting an absolutist approach which has been completely rejected by the highest courts of both Michigan and California (see cases cited *supra*, n. 3). Other jurisdictions, while prohibiting public employee strikes to one degree or another, all refrain from using the awesome contempt power to *jail* peaceful rank and file strikers, which adds overkill to overbreadth. And, of course, many jurisdictions have taken the necessary initiative to develop realistic public employee labor policies. See Point III, *infra*.

We do not believe that the issue is that of "an absolute right to strike." See *Dorchey* v. *Kansas*, 272 U. S. 306 (1926); *International Union UAW-AFL* v. *Wisconsin Industrial Relations Board*, 336 U. S. 245 (1949). We know also that the broad formulations of *Thornhill* v. *Alabama*, *supra*, in the area of picketing have been the subject of much limitation by this Court. *International Brotherhood of Teamsters, Local 695, AFL* v. *Vogt, Inc.*, 354 U. S. 284 (1957).

But the fact that the rights of the employees are not absolute does not mean that the state has an unlimited right to bar activity in the First Amendment area freed of constitutional restraint.

Nowhere is the overbreadth of the New Jersey rule more clear than in the scope of support and communication activity which its courts prohibit in connection with public employee strikes. The *ex parte* restraint in the instant case not only forbade concerted action in furtherance of a strike by the teachers; it forbade any individual "acting in concert" with them from "directly or indirectly", "encouraging", "fostering", "sanctioning" or lending "support" to any "impediment to work" by any school employee. On its face and as applied, this injunction was designed to prevent both teachers and others interested in the teachers' grievances against the Newark school system from expressing publicly their feelings of support for and solidarity with the teachers' cause, since such expression would of necessity encourage and sanction the teachers' conduct of a strike. Thus when civil rights leader Bayard Rustin came to address a union rally in Newark on February 8 he was handed an order to showcause (Tr., Feb. 16, 1970, 30-33). Mr. Rustin was not tried, but less well known individuals, retired teacher

Alice Saltman and sympathizer Jerry Meyer, were prosecuted and convicted.

Probably not since the heyday of anti-labor injunctions in the 1920's and 30's has a court issued an injunction which so broadly prohibits conduct clearly within the area of the First Amendment.

How different is the rule in New Jersey from that in California, where the court in a case involving a strike of social workers acknowledged that it might be appropriate under given circumstances to enjoin strikes of public employees but that an injunction so issued had to be narrow so as not to prohibit, for example, "mere informational picketing and demonstrations designed to communicate the content of grievances and mobilize public support." *In re Berry*, 65 Cal. Rptr. 273, 283 (1968). Similarly, the court pointed out that an injunction could not be sustained which "forbids 'inducing others to participate' in demonstrations." As the court said,

> "Even if we assume, as we have done above, that all such activity would be properly enjoinable insofar as it advocated a strike by public employees, still a vast area of constitutionally protected activity falls within the wide reach of the ban." 65 Cal. Rptr. at 285.

In the recent opinion in *United Transportation Union* v. *Michigan*, 28 L. Ed. 2d 339 (April 5, 1971), the facial unconstitutionality of an injunction identical to that struck down by the Court in *Brotherhood of Railroad Trainmen* v. *Virginia State Bar, supra*, was detailed. Mr. Justice Black took pains to express the abuses to which the broad decree *could* be put. Nor could subsequent state administration of the injunction ameliorate the First Amendment impact.

> "Our statement in *NAACP* v. *Button* concerning the statute there in question is equally applicable to the injunction now before us: '[W]e cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights.' 371 U. S. at 438, 9 L. ed. 2d at 421." 28 L. ed. 2d at 344.

A plain reading of the injunction *sub judice* would prohibit, for example, one from "agreeing" (par. 7) to "parade . . . in the vicinity of . . . premises of the plaintiff" (par. 2), or "encouraging" (par. 2) another to so parade. A single person "parading" to the Board of Education administrative office (attached to the City Hall of Newark) would thus be subject to criminal penalty. The combinations and permutations of banned conduct are limitless and transcend the most basic forms of speech. How does one react when he is forbidden, under penalty of imprisonment, from "indirectly", "sanctioning" an "impediment to work" (par. 1)?

The matters of overbreadth and vagueness are not simply questions of language. The consequences—the threatened jailing of 186 persons, 97% of whom were never even named in the injunction—suggest the infirmities of overbreadth and vagueness transcending semantics; here we deal with functional overbreadth and functional vagueness. The extension of the punitive powers of an injunction to unnamed persons may well be appropriate in some circumstances where the prohibited conduct is precisely defined. No such precision exists here.

New Jersey in the same manner ignores in the procedural area firm principles of due process which this Court has insisted must be adhered to where First Amendment activity is affected. One hundred and eighty-six individ-

uals have been sentenced to jail for violation of an *ex parte* restraining order where no effort whatever was made to give them notice of the application and where 180 of them were not even named in the injunction. *Carroll* v. *President and Commissioners of Princess Anne,* 393 U. S. 175 (1968), emphasized that:

> ". . . there is no place within the area of basic freedoms guaranteed by the First Amendment for such [*ex parte*] orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." 383 U. S. at 180.

Every word of the *Carroll* ruling is applicable to this case. Indeed, there was even more justification in *Carroll* for the failure to communicate in advance with the defendants since that involved a truly emergency situation of a rally scheduled a bare few hours off, following a tense situation created by a rally just the night before. The instant case involves an injunction issued some 36 hours in advance of a strike which had been threatened for some days before. Of course it is an *a fortiori* matter that, if named parties not given notice of the impending issuance of the court decree are beyond the court's jurisdiction, those unnamed must be unrestrained by that decree. See *Alemite Mfg. Corp.* v. *Staff,* 42 F. 832 (2d Cir., 1930) (Learned Hand, J.). See also *Zenith Corp.* v. *Hazeltine,* 395 U. S. 100 (1969).

Certain individual rights of public employees not involving concerted activity have already been squared with constitutional precepts. See, *e.g., Wieman* v. *Updegraff,* 344 U. S. 183 (1952) (loyalty oaths for state employees); *Slochower* v. *Board of Education,* 350 U. S. 551 (1956) (discharge from employment for invoking Fifth Amend-

ment); *Pickering* v. *Board of Education,* 391 U. S. 563 (1968) (school teacher's discharge for public criticism of school board's handling of bond issue); *United States* v. *Robel,* 389 U. S. 258 (1967) (threatened jail term for refusing to resign position in "defense facility"). It is now timely for similarly established constitutional rights to be applied to public employee concerted activity.

III.

The decisions below conflict with all studied efforts to resolve the complex social problems inherent in public employee unionism, and if allowed to stand will serve as precedent for the "easy answer", in total disregard of requirements of precision of regulation in this First Amendment area.

Reference has already been made to the significant context of this case. Now, with fully 15% of the total civilian labor force employed by federal, state and local governments,[10] the processes of government are straining for resolution of the competing claims of government for continuity of service and of public employees for the advantages of group activity. It may well be true that as concerns employees in the private sector "unionism . . .

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[10] Bruff, "Unconstitutional Conditions Upon Employment: New Departures in the Protection of First Amendment Rights," 21 Hastings L.J. 129, n. 1 (1970); Comment, "Constitutional Rights of Public Employees: Progress Toward Protection," 49 N. Car. L. Rev. 303, 304 (1971).

See also, U.S. Dept. of Labor Bureau of Labor Statistics, 1968 at 8, Table 41 (1968).

has apparently reached a plateau . . . in conceptualitation of underlying dispute settlement philosophies, procedures and legal structures." See Smith, *supra,* n. 2, 67 Mich. L. Rev. at 892. In the public sector that is anything but the case. For the 12 million public employees in this country, the meaning of the Constitution in respect to their freedom of association and their rights of expression has by no means been resolved, as this case so clearly demonstrates.

The problem is a pressing one because not only has there been a rapid increase in the proportion of the total work force employed by various levels of government, but also there has been a remarkable increase in the extent of organization amongst public employees. As one authority has recently pointed out, "ninety-nine per cent of American cities with a population over 250,000 have unions or employee associations representing public workers. . . . The fastest growing labor organization in the country is the American Federation of State, County, and Municipal Employees, AFL-CIO." See Kheel, "Strikes and Public Employment," 67 Mich. L. Rev. 931 (1969).

The range of proposals in this field runs from absolute strike bans, through limited bans, to absolute right to strike for public employees. See footnote 1, *supra.* Your petitioners do not expect the Court to become embroiled in the vast permutations and combinations which could make up sound labor policy throughout government. But New Jersey's absolutist position in contrast with the healthy recognition by many states and all the authorities of the need for careful and meticulous legislation necessarily brings into sharp focus the constitutional parameters governing developments in this area.

Illustrative of the substantive areas where testing is now proceeding in the many jurisdictions wrestling with these complex social problems is the federal government's recognition of a need for greater consideration of postal employee relations. The strike of 1970 made Congress recognize that if postal employees were to be barred from striking, an impasse procedure—in that case, binding arbitration—had to be provided "so as to assure parity of bargaining power between labor and management." Kappel Commission in Postal Reorganization, U. S. Code Congressional and Administrative News, 1970, pp. 3662-63. See 39 U. S. C. §1207.[11] Other jurisdictions are at work differentiating between and among their public servants as to essentiality of function.[12] Several jurisdictions specifically permit public employee strikes, but provide for emergency foreclosure of work stoppages upon a showing of extreme impact on health or welfare.[13] Finally, the matter of penalty for strikers

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[11] For other arbitration provisions, see, e.g., Statutes of Canada 1966-67, Chap. 72 — Public Service Staff Relations Act §§ 63, 72; Maine Rev. Stat. 26 §965 (1970 Supp.) (issues limited); Mich. Stat. Ann. 317.455 (31)-(47) (police and firemen at option of either party); Purdon's Pa. Stat. mental institutions, and employees of the courts, §217.4 (police and firemen); Gen. Laws of R.I. 28-9.1-7 (1970 Supp.) (firefighters) §28-9.2-7 (police) §28-9.3-1 and §28.9-4-1 (teachers and other municipal employees, at option of either party; Utah Code Ann. §11-20-32 (1969 Supp.) (binding arbitration in all matters); Wyoming Stat. §27-269 (firefighters).

[12] Gen. Laws of R.I. 28-9.1 *et seq.* (1970 Supp.); Purdon's Pa. Stat. Ann., Title 43 §1101.1001 (1971 Supp.); Vt. Stat. Ann., Title 21 §1706 (1970 Supp.)

[13] 1970 Session Laws of Hawaii, Act 171 §12; Purdon's Pa. Stat. Ann., Title 43 §1101.1003 (1970 Supp.) (limited); Vt. Stat.

(Footnote continued on following page)

(and/or the union as an institution) is receiving considerable attention.[14]

The jailhouse, as the remedy for peaceful group action, is not employed except in New Jersey.

Thus, experimentation is proceeding in many areas—except New Jersey. The New Jersey position, as previously outlined (1) absolutely bans the strike for any and all public employees, (2) provides no effective post-impasse procedure for resolving differences short of economic warfare, and (3) imprisons peaceful rank and file strikers. New Jersey, uniquely, relies on the common law and mass jailing instead of exercise of "legislative judgment." See *Ashton* v. *Kentucky,* 384 U. S. 195

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Ann., Title 21 §1704 (1970 Supp.) (firefighters excluded). *Cf.,* 29 U.S.C. §§176-179, Labor Management Relations Act (national emergency), and interpretation in *United Steelworkers of America* v. *United States,* 361 U.S. 39 (1959).

It is interesting to note that the New Jersey Commission (reporting Jan. 1968) studying these matters recognized "that both public sentiment and judicial opinion may alter over time" as to the right to strike. Smith, *supra,* n. 2, at 909.

[14] Mich. Comp. Laws Ann. §423.206 (1967) (only remedial action against individual striker is discharge); N.Y. Civ. Serv. Law §210 (Amended 1969) 2(f) (one-year probation and restriction on tenure for individual striker) 2(a) (fine of two days' pay for each day individual strikes) 3(f) (loss of benefit of checkoff to union as an institution) (see also Judiciary Law §751, 2(a) (1967) (fine only penalty for union in contempt)); Exec. Order 10,988 (3 CFR 521 (1959-63 compilation)) (union of federal employees loss of representation status); Vt. Stat. Ann., Title 21 §1706 (1970 Supp.) (striking firefighters discharged and barred from future public employment).

(1966); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940). It is thus incumbent upon the Court to focus on the New Jersey position, for if it is allowed to stand, incentive to take on the difficult task of accommodating First Amendment rights with public employee concerted activity will be undermined.

IV.

The New Jersey Court's misapplication of *Walker* v. *City of Birmingham* in the critical area of First Amendment rights requires review.

In its opinion sustaining the conviction of the defendant Joan Stevens, the Appellate Division stated that "constitutional attack [against the injunction] is not available to defendant in these collateral contempt proceedings," citing *Walker* v. *City of Birmingham,* 388 U. S. 307, 317 (1967) (cited in *Joan Stevens* unreported *per curiam* opinion, 16a). The lower court has seriously misread *Walker* and has thereby denied fundamental constitutional rights.

There are several reasons why this case differs from *Walker.* However, one major difference—if not examined and excluded by this Court from the *Walker* doctrine—could bring about a substantial change in injunctive processes throughout the nation which, when applied in First Amendment areas as in this case, has calamitous effect. *Walker* holds that issues as to the validity under the federal Constitution of a state court injunction may not be raised as a defense to a contempt proceeding where no action was taken to contest the injunction. That is an understandable rule to apply, as in *Walker,* to persons who are parties to the injunction proceeding. But

how can it possibly apply to a person not a party to the injunction proceeding? He is in no position to litigate constitutional issues arising from the injunction until he is confronted with the contempt proceeding. To bar opportunity to do so then on the theory that he should have come forward previously, when he was not even a party, is a plain denial of due process of law. (A corollary to this proposition is the impropriety of analogizing *United States* v. *United Mine Workers,* 330 U. S. 258 (1947), to the case *sub judice.* Though the law may bind and enjoin named parties pending a determination by the court of its jurisdiction, it may not so bind unnamed parties. Of course, the *Mine Workers* case only involved the union president and the national union, who were named parties. Compare *In re Green,* 369 U. S. 689 (1962).)

The change in injunctive process inherent in applying the *Walker* stricture to unnamed persons will undoubtedly have broad impact on First Amendment rights, and thus should be reviewed by the Court prior to haphazard implementation by subordinate courts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinions of the New Jersey Superior Court, Appellate Division.

Respectfully submitted,

MORTON STAVIS
PAUL J. GIBLIN
Counsel for Petitioners

On the Petition:

MORTON STAVIS
MORRIS STERN

APPENDIX A

Opinion of the Superior Court of New Jersey, Appellate Division

THE BOARD OF EDUCATION OF NEWARK IN THE COUNTY OF ESSEX, a corporation, etc.,

Plaintiff-Respondent,

vs.

NEWARK TEACHERS UNION, LOCAL NO. 481, AMERICAN FEDERATION OF TEACHERS, A.F.L.-C.I.O., etc., *et al.*,

Defendants.

In the Matter of

NEWARK TEACHERS UNION, LOCAL 481, AMERICAN FEDERATION OF TEACHERS, AF.L.-C.I.O., etc., and One Hundred Eighty Five (185) others,

Appellants.

The opinion of the court was delivered by CONFORD, P.J.A.D.

This is an appeal by the defendant union and 185 individual defendants from summary adjudications of contempt of court and sentences pursuant thereto for violation of a January 31, 1970 order of the Chancery Division restraining defendants from engaging in a strike against

the Newark Board of Education. The issues projected on the appeal are narrow. Prohibited picketing by most of the defendants is in effect conceded in the single brief filed on behalf of all defendants.

A quotation from defendants' brief well sets the background against which the issues before us must be considered:

> "On the following day (February 1) at a meeting sponsored by the Newark Teachers Union, held at the Military Park Hotel in Newark, attended by 2,000 or more people, covered by all major television and radio networks and newspapers in the New York metropolitan area, a strike was called. On the following day, Monday, more than 3,000 of the approximately 4,000 school teachers of the Newark school system did not report to their classrooms. That situation with some up and down fluctuations remained fairly constant throughout the four weeks of the strike."

The foregoing may be supplemented by the fact that at the February 1 (Sunday) union mass meeting the president of the union, Carol Graves, told the audience that the union had been served with the restraining order but that it would strike anyway as the only means of redress of its grievances.

The restraining order was broad and comprehensive. It was directed against the union, the New Jersey State Federation of Teachers, "their respective members, officers, directors, committee members, employees, agents and representatives," [there followed the names of 11 individuals] "and all persons acting in behalf of or in con-

cert or participation with the said defendants or the said members, officers," etc. Among the acts that were prohibited were:

> "1. Causing, instigating, promoting, sanctioning, authorizing, carrying on, participating in, fostering, continuing, lending support or assistance to or aiding or abetting any strike, sitdown, slowdown, work stoppage or other impediment to work, against the plaintiff or by any employee or employees of the plaintiff;
>
> 2. Picketing, congregating, parading, patrolling, loitering, gathering, or walking back and forth,—or causing, instigating, promoting, encouraging, sanctioning, intimidating, coercing, counselling or authorizing any person or persons to picket, congregate, parade, patrol, loiter or walk back and forth,—in front or in the vicinity of the public schools, buildings, grounds, playgrounds, yards, or premises of the plaintiff or operated or administered by the plaintiff, or in front of any buildings, grounds, playgrounds and premises on or at which any instructional or guidance program is conducted by plaintiff;
>
> 3. Interfering with, obstructing, impeding, or delaying, or attempting to interfere with, obstruct, impede or delay the plaintiff in the performance of any of its duties and functions or in the conduct of the Newark public school program; . . .
>
> 7. Agreeing, conspiring, or combining to do any of the foregoing acts, or directly or indirectly accepting, arranging for, or soliciting from any source

funds or other support for the doing of any of the foregoing acts mentioned in paragraphs '1' to '6', directly preceding the within paragraph '7'."

While the order was to expire February 13, 1970 it was continued and ultimately made permanent.

Most if not all the individual defendants were arrested for violations of the restraint, generally when found picketing or assembling and congregating outside the schools on what normally would have been regular school days when the teacher-defendants would normally be expected to be working inside the buildings. Six officers of the union were arrested pursuant to arrest orders expressly naming them. Almost all the other individual appellants were arrested pursuant to a general arrest order issued by the Chancery Division not naming specific persons but directing the arrest by the Sheriff of "any individual who in his presence or that of any member of his staff is observed to continue to violate this court's order of January 31, 1970".

I.

Th first appellate point urged is that the general order of arre ' was illegal and the State may not rely upon the "fr··its" of the illegal seizures pursuant thereto – *i.e.*, the identification of the picketing defendants. Even if the premise were conceded the conclusion derived therefrom would not follow.

Even if the general order be invalid for failure to name or identify particular persons to be arrested, *cf. West* v. *Cabell*, 153 U. S. 78, 85-6 (1894); Fisher, *Laws of Arrest* 107 (1967), we do not find the arrests invalid.

Appendix A

An arrest not supportable under a warrant therefor will not be held invalid if there is another basis upon which to sustain it. *Cf. State* v. *Masco,* 103 N. J. Super. 277, 282 (App. Div. 1968). Here there is.

The common law made a distinction between felonies and misdemeanors for purposes of distinguishing the criteria for authorization of an arrest by a peace officer without a warrant. In the case of the former the test was probable cause to believe the arrestee had committed or was committing the offense; in the latter, whether the offense was being committed in the officer's presence. *State* v. *Smith,* 37 N. J. 481, 494-495 (1962), *cert. den.* 374 U. S. 835 (1963). In *State* v. *Doyle,* 42 N. J. 334 (1964), the dichotomy between "felonies" and "misdemeanors" for the foregoing purposes was transmuted into one between offenses punishable by incarceration in state prison for more than one year and those not so punishable (*Id*, at 349). In the present case, since the alleged offenses by defendants were specified by the court's order to be prosecuted summarily by the court without initial indictment by grand jury and trial by jury the maximum potential incarceration for guilt became limited to six months. *In Re Ruth M. Buehrer et al.,* 50 N. J. 501 (1967). Consequently, applying the criterion of *Doyle, supra,* these alleged offenses fell into the category wherein the peace officers could arrest only if the offenses were committed in the presence of the officers. It is our conclusion that they did.

The term "presence" sums up the requirement that the officers knew of the criminal event by the use of their senses. *State* v. *Smith, supra* (37 N. J., at 495). The criminal event in the present case would be any objec-

tive conduct by an individual which an officer could fairly conclude was violative of the restraining order. Picketing, with or without the carrying of signs, would obviously be such. The order also contains prohibitory language broadly referable to the ordinary common-law concept of aiding and abetting. Individuals assembling or milling about in groups outside schools or school administration buildings, inferably to deter teachers or other school personnel from attending to their duties or to encourage others to continue with their participation in the union endeavor to carry on the strike, can fairly be said to be aiding and abetting the violation of the restraining order by others as well as directly violating it themselves. We therefore conclude the offenses by those defendants who were arrested were being committed in the presence of the arresting officers and that the arrests were consequently valid.

This makes it unnecessary for us to consider what seems to us at least a dubious proposition—that if the arrests were illegal the convictions were achieved with the aid of the illegal "fruits" thereof in the form of "identification" of the wrongdoers.

II.

Defendants contend that they were convicted of contempt of court because of absence from the classroom although they were never charged with that act.

We do not find that any defendant was convicted of contempt for absence from the classroom *per se* as an act of disobedience of the restraining order. It is evident from the totality of the findings in each case that evidence of absence from the classroom by teacher de-

fendants, coupled with proof that the absentee had failed to comply with a school regulation requiring explaining absences to the principal of the school, and in the light of all the other evidence in the case, was taken as a sufficient showing to justify the ultimate determinative finding that the particular absent defendant was participating, directly or indirectly, in the strike, contrary to the restraining order.

That the several trial judges entertained this conception is illustrated by Judge Mintz' comment at the outset of the Kirschbaum hearing: "* * * we'll proceed on the theory that the Order to Show Cause charges this defendant with unlawful picketing in front of the Lafayette Street School on February 19, 1970 and unlawful absence from his classroom *as part of a strike movement on the part of Local Union 481*" (emphasis added).

Again, "Now, the contention of the State is that this defendant by absenting himself unlawfully or without justifiable reason from the classroom *aided and abetted in a strike*". (Emphasis added.)

Thus it was the ultimate determination, expressly or impliedly, of participation in the strike which underlay each adjudication of contempt.

The vast majority of the individual defendants were proven to have been picketing, and as to these there can be no question that the adjudications of contempt were unexceptionable. Defendants' brief names eight defendants who assertedly were not proven involved in picketing but were convicted solely on the allegedly uncharged offense of absence from school. Those so named are defendants Raymond Kirschbaum, Fred Klock, Dorothy

Appendix A

Bergman, Ellen Asselmeyer, James Peluso, Marilyn Lago, Marie Mirabella and Alan Yablonsky. The specific evidence and findings as to these were as follows:

Kirschbaum. On February 19 he was loitering as one of a group of three persons across the street from Lafayette School whereas his place of employment as a teacher was East Side High School. He was found not to have been "picketing" as such "in front of" Lafayette School. He was found to have absented himself from classes without cause or notice.

Klock. He was observed on February 19 driving a car in front of the Summer Avenue School and waving his left arm out the car window. He was then seen to stop his car in front of the school and blow the car horn while continuing to wave his arm. A number of persons, including several of the other defendants who had been walking in front of the school, moved out of their line upon hearing Klock. Klock was then arrested. There was also evidence that Klock was assigned to Barringer High School, and was absent without notice from February 2 to 25, 1970. On the basis of this evidence a trial judge found that Klock was probably "the lookout for picketers at or near Summer Avenue School"; he interpreted the evidence against Klock as indicating that the defendant "would blow his [car] horn and wave his hand to direct picketers to leave when the official car was arriving in the area."

Bergman. Several officers and detectives saw her at the Summer Avenue School on February 19 wearing a sign referring to the teachers' union and standing near an automobile occupied by two other persons. There was also evidence that she had been absent from the Boylan

Street School without notice from February 2 to 25. A trial judge found that she had been "present with a picket sign near the Summer Avenue School after some of her colleagues had been arrested" in addition to having participated in the strike with knowledge of the restraining order.

Asselmeyer and Peluso. These defendants were the two persons in the car next to which defendant Bergman was arrested The evidence against them was that a sign referring to the strike was seen in the car which they occupied, and upon the arrest of Miss Bergman the car drove away from the Summer Avenue School. A detective gave chase in his vehicle and apprehended Peluso and Asselmeyer several blocks from the school. There was also evidence that Peluso was absent without explanation from his assigned duties at Abington Avenue School from February 2 to 25, and that Asselmeyer was absent throughout the same period from the Boylan Street School. The trial judge found that these two defendants

> "were observed on February 19, 1970 in the area of Summer Avenue School. Mrs. Asselmeyer was wearing a picket sign, and Mr. Peluso accompanied her in an automobile in which the picket sign was located. From this it can be inferred that they had picketed in the area of Summer Avenue School, but, in any event, they were out of school despite knowledge of the restraining order, and by staying out in concerted fashion with their colleagues until February 26, as a result of the strike call on February 1 at the union meeting, they were thereby, also guilty of violating the order."

Appendix A

The trial judge found that an inference of picketing by these defendants were permissible and that they had concertedly violated the restraint.

Lago, Mirabella and Yablonsky. There was evidence that they were seen standing in front of Immaculate Heart of Mary Church, across the street from the Lafayette Street School, on February 19. There were no pickets immediately in front of that school. As a vehicle bearing Eessex County Sheriff's markings approached the school, the three named defendants ran into the church; after the marked vehicle left the area of the school and church the defendants returned to the sidewalk in front of the church. They were subsequently arrested. There was also evidence that Yablonsky was absent from his South Street School duties from February 2 to 25 without notice to the principal, and that Marilyn Lago and Maria Mirabella were inexcusably absent from their duties at the Oliver Street School during that same period, although Marilyn Lago did call in sick from February 19 to 25. The trial judge found that the evidence sustained the charge that these defendants were picketing, congregating, parading, etc. "in the vicinity" of a Newark public school.

We conclude that all the defendants, including those specifically mentioned above, were properly found guilty of contempt of court in that the proofs justified beyond a reasonable doubt findings that they violated the restraining order by willfully participating in or aiding and abetting the strike in one or more of the ways prohibited by the restraining order.

Pursuant to our appellate responsibility under N.J.S.A. 2A:10-3 and R. 2:10-4; *Sarner* v. *Sarner,* 28 N. J. 519,

525 (1959), app. dism. 359 U. S. 533 (1959), reh. den. 360 U. S. 940 (1959); *State* v. *Gussman,* 34 N. J. Super. 408 (App. Div. 1955); and *Zimmerman* v. *Zimmerman,* 12 N. J. Super. 61, 69 (App. Div. 1950), we have reviewed the evidence in all the cases *de novo* on the record and concur in the findings below of guilt of each of the defendants of contempt of court beyond a reasonable doubt.

III.

Defendants contend they were improperly convicted of contempt in that they were afforded no or inadequate notice of the offense or offenses they were charged with. We do not agree.

Specifically, defendants contend the requirements of R. 1:10-2, governing summary contempt proceedings, were not observed by the State. The rule requires the court to institute the proceedings by order for arrest or order to show cause "specifying the acts or omissions alleged to have been contumacious". The arrest order of February 10 recited sworn allegations that "illegal picketing has been and is being conducted on a well-organized plan". The complaints filed against particular defendants charged assembling with others and picketing at named locations. Each defendant was later served with an "order continuing arrest" charging them, knowing of the existence and content of the restraining order of January 31, with (a) carrying on and participating in a strike against the board of education; (b) picketing, congregating and assembling at a specific location in front of a school or board of education building; and (c) obstructing and impeding the board of education in conducting its functions and programs.

We are satisfied that the foregoing, in totality, adequately apprised the defendants of the charges on which they would be tried and met the spirit and intent of R. 1:10-2 as well as defendants' rights to due process.

IV.

Defendants contend that the sentences imposed were "arbitrary and excessive". The sentences imposed were, for the most part, of ten days in jail and $200 fines. Up to three months in jail and $500 fines were imposed upon union leaders. The union was fined $40,000. The argument is that the sentencing motivations were "subjective" whereas they should have been exclusively based on the "objective" facts; that the defendants were being punished essentially for striking rather than for violating the restraint.

The assertions are not soundly conceived. Sentences were in all cases based upon the violation of the restraint although the effect of the contempt on the public interest was undoubtedly in the minds of the sentencing judges, having been expressly mentioned in some instances. Defendants' apparent argument—that the nature and effect of the conduct restrained by the order contemned is irrelevant to appropriate punishment for the contempt—is ill founded. Were it accepted, all criminal contempts of court would be punished relatively uniformly, all being theoretically merely the affront to the dignity of the court. The law is otherwise. The public interest in the subject matter of the restraint is a highly relevant factor in assessing punishment for the contempt. *In Re Ruth M. Buehrer et al., supra* (50 N. J. at 507, 508). There is no more important public interest than the freedom from

interruption in, or the disruption of, the ducation of school children. See *N. J. Const.*, Art. VIII, § IV, par. 1.

It is our duty as an appellate court in summary contempt cases to adjudge punishment as well as guilt. N.J. S.A. 2A:10-3; R. 2:10-4; *Sarner* v. *Sarner, supra; Zimmerman* v. *Zimmerman, supra.* We have hereinabove adjudicated guilt of all defendants. After assaying the whole record and considering the appellate arguments we concur in the sentences severally imposed on each of the defendants by the respective trial courts which are herewith incorporated by reference into this determination. All pending stays are vacated. Fines are to be paid forthwith if not already paid. Jail terms shall be served commencing July 12, 1971.

So ordered.

APPENDIX B

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

In the Matter of

JOAN STEVENS

Charged with Contempt of Court

PER CURIAM

Defendant Stevens, a teacher in the Newark School system, appeals from the judgment finding her guilty of contempt of court because, on February 18, 1970, she had engaged in picketing at the Avon Avenue school in violation of the provisions of an order, originally entered in the Chancery Division on January 31, 1970, prohibiting a strike against the Newark Board of Education. She was sentenced to 10 days in the County Penitentiary and fined $200.

The circumstances of the strike and the details of the restraining order are set forth in our opinion filed this day in *"Board of Education of Newark, etc.* v. *Newark Teachers Union, etc. et al"* . . . *"In the Matter of Newark Teachers Union Local 481 etc. and 18 others"* (the Board of Education case) and need not be repeated here.

Miss Stevens was one of a number of persons brought to trial before Judge Allcorn on March 16, 1970 and found guilty of contempt of court for violating the re-

straining order. The appeals of those defendants other than Miss Stevens are included among the appeals in the "Board of Education case"; Miss Stevens has filed a separate appeal through separate counsel.

Five points are argued for reversal. We find no merit in any of them.

It is undisputed that at about 8 A.M. on February 18, 1970 sheriff's officers found a group of ten people, one of whom was Miss Stevens, walking in a circle or back and forth in front of the Avon Avenue school. Some carried signs reading, among other things, "no contract, no work," "better schools," "teachers want what children need." The officers were unable to recall whether Miss Stevens was carrying a sign. All ten were arrested and charged with contempt of court.

Defendant's first two points may be considered together. She contends that "the evidence does not support a finding of guilty beyond .. reasonable doubt" because it fails to show that she had actual knowledge or notice of the restraints. Noting that there was no evidence that she "was informed directly of the restraining order or its terms," defendant argues that the proofs do not support the finding that she knew of the restraints which she was charged with violating.

We conclude from our examination of the record that the proofs support the trial court's finding; indeed that they dictate the same finding by us in the exercise of our appellate responsibility to determine guilt under N.J. S.A. 2A:10-3 and R. 2:10-4.

It is evident that Miss Stevens engaged in the picketing in furtherance of the strike and its objectives. The

strike had begun on February 2 and Miss Stevens stayed out of school from that day until February 25, 1970. Publicity with respect to the strike, the restraints issued against it and the numerous previous arrests made for violations of those restraints was intense and widespread. Notice of the injunction was posted on school bulletin boards.

The inescapable inference from the proofs is that defendant was fully aware of the restraints and deliberately violated them when, on February 18, 1970—17 days after the strike started and her absence from school began—she joined fellow teachers in picketing at the Avon Avenue school.

There is no substance in defendant's contention "that the Restraining Order is so vague and ambiguous on its face as to fail to give reasonable notice."

Nor is there any merit in the claim that the restraining order was too broad and violated defendant's constitutional rights of free speech and assembly. *Bd. of Education, Borough of Union Beach* v. *N.J.E.A. et al.*, 53 N. J. 29, 40-43 (1968). A restraint against an unlawful strike and picketing in furtherance thereof was constitutionally permissible. The order gave sufficient notice of what was prohibited to satisfy the requirements of due process.

Further, the constitutional attack is not available to defendant in these collateral contempt proceedings. *Walker* v. *City of Birmingham*, 388 U. S. 307, 317, 87 S. Ct. 1824, 1830 (1967).

We find no validity in the contentions that the procedural requirements of R. 1:10 were not complied with

and that defendant's arrest without a warrant was not authorized.

We concur in the findings of the trial court that defendant has been proven guilty of contempt of court beyond a reasonable doubt. Further we are satisfied that the sentence imposed by the trial court was warranted and concur therewith.

The fine of $200 is to be paid forthwith if it has not already been paid. The sentence of ten days in the County Penitentiary is to be served commencing July 12, 1971.

So ordered.

APPENDIX C

Order of the Supreme Court of New Jersey Denying Certification

(Filed—July 7, 1971)

SUPREME COURT OF NEW JERSEY

C-547 SEPTEMBER TERM 1970

THE BOARD OF EDUCATION OF NEWARK, etc.,

Plaintiff-Respondent,

vs.

NEWARK TEACHERS UNION, etc., *et al.*,

Defendants-Petitioners.

On Petition for Certification

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 7th day of July, 1971.

IRVING B. ZERCHNER
Acting Clerk of the Supreme Court

Appendix C

Order of Supreme Court of New Jersey Dismissing Appeal

(Filed—July 7, 1971.)

SUPREME COURT OF NEW JERSEY

SEPTEMBER TERM 1970

THE BOARD OF EDUCATION OF NEWARK, etc.,

Plaintiff-Respondent,

vs.

NEWARK TEACHERS UNION, etc., *et al.*,

Defendants-Petitioners.

This matter having been duly presented to the Court, it is Ordered that the appeal is dismissed pursuant to Rule 2:12-9.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 7th day of July, 1971.

IRVING B. ZECKNER,
Acting Clerk

Appendix C

Order of Supreme Court of New Jersey Granting Stay

(Filed—July 7, 1971.)

SUPREME COURT OF NEW JERSEY

SEPTEMBER TERM 1970

THE BOARD OF EDUCATION OF NEWARK, etc.,

Plaintiff-Respondent,

vs.

NEWARK TEACHERS UNION, etc., *et al.*,

Defendants-Petitioners.

This matter having been duly presented to the Court, it is Ordered that the motion for stay is granted to July 22, 1971 to permit application for stay to the U. S. Supreme Court on notice to the County Prosecutor. All sentences to commence on August 2, 1971 if no stay is granted by the U. S. Supreme Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 7th day of July, 1971.

IRVING B. ZECKNER,
Acting Clerk of the
Supreme Court

APPENDIX D

Order of Honorable William J. Brennan, Jr.

SUPREME COURT OF THE UNITED STATES

No. A-54, OCTOBER TERM, 1971

NEWARK TEACHERS UNION, etc., *et al.*,

Petitioners,

vs.

THE BOARD OF EDUCATION OF NEWARK, etc.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners and the response of counsel for the respondent in opposition thereto,

IT IS ORDERED that the execution of the judgment and mandate of the Superior Court of New Jersey, Appellate Division, in the above-entitled cause be, and it is hereby, stayed, pending the filing of a petition for a writ of certiorari on or before August 15, 1971. Should such a petition be so timely filed, this stay is to continue pending this Court's action on the petition. If the petition for a writ of certiorari is denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to remain in effect pending the issuance of the mandate of this Court.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States.

Dated this 23 day of July, 1971.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-230

NEWARK TEACHERS UNION, etc., *et al.*,

Petitioners,

—v.—

THE BOARD OF EDUCATION OF NEWARK, etc.,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-230

NEWARK TEACHERS UNION, etc., *et al.*,

Petitioners,

—v.—

THE BOARD OF EDUCATION OF NEWARK, etc.,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

It is hereby respectfully moved pursuant to Rule 42 of The Rules of this Court that the above named *amicus curiae* be granted leave to file the accompanying brief in support of the Petitioners.

Consent to such filing has been requested and has been granted on behalf of the Petitioners. Counsel for the Respondents have been unable to grant or deny the request in adequate time for the accompanying brief to be filed. The Petitioners' letter of consent has been filed with the Clerk.

The interest of the *amicus curiae* as stated in the accompanying brief is as follows:

The American Civil Liberties Union is a nation-wide, non-partisan organization with approximately 160,000 members in the United States. It is engaged solely in the

defense of those principles embodied in the Bill of Rights. During its fifty-year existence, the ACLU has been concerned with the protection of First Amendment rights from the unlawful actions of state officials, and with the procedures by which such unlawful restraints can be responsibly and peacefully challenged in the courts.

This case presents significant issues concerning the doctrine of overbreadth of the First and Fourteenth Amendments. It raises also a point of conflict between recent Supreme Court decisions concerning the lawful challenge of unlawful authority exercised against individual free speech. The accompanying brief addresses these points.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-230

NEWARK TEACHERS UNION, etc., *et al.*,

Petitioners,

—v.—

THE BOARD OF EDUCATION OF NEWARK, etc.,

Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITION

Interest of *Amicus Curiae*

The American Civil Liberties Union is a nation-wide, non-partisan organization with approximately 160,000 members in the United States. It is engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty-year existence, the ACLU has been concerned with the protection of First Amendment rights from the unlawful actions of state officials, and with the procedures by which such unlawful restraints can be responsibly and peacefully challenged in the courts.

This case presents significant issues concerning the doctrine of overbreadth of the First and Fourteenth Amendments. It also raises a point of conflict between recent Su-

preme Court decisions concerning the lawful challenge of unlawful authority exercised against individual free speech.

Questions Presented

I. Whether the constitutionality of an injunction issued *ex parte,* without a showing that notice could not be served, may be challenged in defense of a prosecution for criminal contempt for violation of that injunction.

II. Whether the constitutionality of an injunction issued *ex parte,* may be challenged in defense of a prosecution for criminal contempt for violation of that injunction when the injunction is so vague as to persons enjoined and activities proscribed as to be incapable of rational interpretation by men of common intelligence.

Statement of the Case

Petitioners, a local union and 186 individuals (including one non-member teacher, one retired teacher, and one local college instructor), were convicted in summary criminal contempt proceedings for violation of an *ex parte* injunction designed to halt a strike and all strike-related speech activities connected with an on-going labor dispute. They face penalties of from ten to ninety days in jail and fines from a $200 minimum, for individuals, to $40,000 for the union.

On January 31, 1970, the date of expiration of the collective bargaining contract, after lengthy negotiations between the parties, the Newark Board of Education ob-

tained an *ex parte* injunction to restrain a strike and all supportive activity by the union, eleven named officers, and unnamed and indeterminate individuals. As the Board had known since January 16, the union was planning to meet February 1 to decide whether to strike if no accord were reached by January 31. No notice, formal or informal, was given any petitioner prior to the issuance of the injunction, notwithstanding the provisions of New Jersey Rule 4:52-1(a). Not until the order had been issued were efforts made to notify the named officers and to post copies on bulletin boards and print it in the newspapers.

A strike commenced February 2 and continued for four weeks. Throughout the strike, there was no violence or threat thereof, no mass picketing or other coercive action. Almost 3,000 of the 4,000 teachers in the Newark school system stayed away from work, including these petitioners. Petitioners were also found to have been picketing or congregating near the schools over the period February 11-20 when the arrests were made. Civil rights leader Bayard Rustin was arrested for contempt for addressing a union rally in Newark February 8.

The injunction (Petition for Writ of Certiorari, pp. 5-8) was issued without modification by the court and without consideration of the issues in and causes of the strike. Nor did the court consider whether it might have drawn its order more narrowly.

Reasons for Granting the Writ

The essence of the substantive dispute between the union and the State is that for years New Jersey has been able to apply its broad common law proscription of public employee strikes to all manner of group activity in support of public employee grievances against the State. As public employee unionism has proliferated and as the issues in public sector labor disputes have become increasingly complex, many states have confronted the challenge through legislation, experimenting with new solutions to new problems. New Jersey, however, has utterly failed to join issue, preferring to muddle through with overbroad injunctive authority without regard to constitutional limitations of due process and freedom of speech or to any lasting resolution of the underlying social issues.

The above argument is persuasively set forth in parts II and III (pp. 19-33) of the Petition for Writ of Certiorari. We concur and feel no need to elaborate upon that argument here. Our more pressing concern is that the Court might feel that it cannot reach the substantive unconstitutionality of the injunction because the issue is raised in defense of criminal contempt charges for violation of that injunction. *Walker* v. *City of Birmingham,* 388 U.S. 307 (1967). It shall be the burden of this brief *amicus curiae* to show that *Walker,* when read with *Carroll* v. *President and Commissioners of Princess Anne County,* 393 U.S. 175 (1968), compels the Court to hear the substantive issue in defense of the criminal contempt charges. *Amicus curiae* shall show further that to apply *Walker* where the injunction against speech is so overbroad, both as to persons covered and as to activities proscribed, as to be incapable

of common interpretation by reasonable men, is to foster litigation discrediting lower state courts while seriously abridging First Amendment and Due Process rights of the citizenry at large.

I.

Injunctions issued *ex parte* without a showing that opposing party could not be served are void.

The fact is uncontroverted that no effort was made to give notice, formal or informal, of the proceedings in which the *ex parte* injunction was obtained against petitioners. No possible excuse exists for this unconstitutional omission.

In *Carroll* v. *President and Commissioners of Princess Anne County,* 393 U.S. 175 (1968), county officials obtained an *ex parte* injunction to ban a rally of which they had less than 24 hours notice. The organizers of the rally, though present in the county, had no established offices or attorneys for convenient service of notice of the injunction proceedings. The rally was scheduled for that same night. In spite of these difficulties this Court held that:

> there is no place within the area of basic freedoms guaranteed by the First Amendment for [*ex parte* temporary restraining orders] where no showing is made that it is impossible to serve or notify the opposing parties and to give them an opportunity to participate. 393 U.S. at 180.

The injunction issued in *Carroll* was based on predictions of violence flowing from the rally and the physical disturbance to the community caused by amplification of the speakers.

In the instant case, school board officials knew on January 16, more than two weeks before the issuance of the *ex parte* order, of the union's plans to strike if no accord were reached by January 31. The union maintained regular offices in Newark, had lawyers on retainer in Newark, and were in contact with school board officials in negotiating sessions at the time the injunction was sought. The meeting to decide whether to strike was to be held the day after the injunction proceedings. Unlike the situation in *Carroll,* one could infer an intent on the part of the school board officials purposely to avoid an adversary hearing on the injunction. Like the situation in *Carroll,* the injunction was sought to restrain both pure speech and speech mingled with conduct.

This Court has not yet been presented with an opportunity to detail the effect of the holding of *Carroll* on the rule of *Walker* v. *City of Birmingham,* 388 U.S. 307 (1967), that violators of an injunction may not defend criminal contempt charges by asserting the unconstitutionality of that injunction. See generally, Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 535-38 (1970); Rodgers, *The Elusive Search for the Void Injunction: Res Judicata Principles in Criminal Contempt Proceedings,* 49 B.U.L. Rev. 251 (1969). Although the injunction in *Walker* was *ex parte,* the Court did not consider the impact of that fact on the case. However, in *Carroll* the Court was clearly concerned with insuring Due Process in the initial injunction proceeding in light of its earlier decision in *Walker* that such injunctions were not to be disobeyed. 393 U.S. at 179.

Statutes may be disobeyed and their constitutionality raised as a defense in subsequent criminal proceedings.

Shuttlesworth v. *City of Birmingham,* 394 U.S. 147 (1969); *Staub* v. *City of Baxley,* 355 U.S. 313 (1958); *Hague* v. *CIO,* 307 U.S. 496 (1939). Administrative orders may not be so challenged without exhaustion of administrative remedies, *Poulos* v. *New Hampshire,* 345 U.S. 395 (1953). However, inroads have been made on the exhaustion requirement where "there appears no significant interest to be served in having the [administrative] system decide the issue before it reaches the courts." *McKart* v. *United States,* 395 U.S. 185, 200 (1969). One may disobey an unlawful police order and not be convicted. *Wright* v. *Georgia,* 373 U.S. 284 (1963). See generally, Note, *Defiance of Unlawful Authority,* 83 Harv. L. Rev. 626 (1970); Selig, *Regulation of Street Demonstrations by Injunction: Constitutional Limitations on the Collateral Bar Rule in Prosecutions for Contempt,* 4 Harv. Civ. Rights Civ. Lib. L. Rev. 135 (1968). That one may not raise the unconstitutionality of a court order in defense of a criminal contempt charge for violation of that order is thus more than a reflection of the policy that we are a government of laws not men; it is clear that some official expressions of the law may be violated to test their constitutionality. Rather it is "respect for the judicial process," 388 U.S. at 321, which is at stake in *Walker* But see *Fields* v. *Fairfield,* 375 U.S. 248 (1963).

What is it that is special about the judicial process? The Court suggests one answer in *Carroll*:

> The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is *ex parte,* because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate. 393 U.S. at 183.

Thus a part of the special authority of courts to state the law derives from their procedures: two parties present two sides to a specific dispute and ask the courts to find facts and apply the law. Where one side is not represented, a part of that special authority is eroded, and the resulting order is no more worthy of blind obedience than the unconstitutional statute or the unlawful order of a police officer. The Court cannot require petitioners to obey a "judicial" order formulated without benefit of a "judicial" hearing. Similarly, an order resulting from an *ex parte* proceeding is more likely to be in error as to fact and law, a problem which is compounded in the area of First Amendment rights.

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order . . . the failure to invite participation of the party seeking to exercise First Amendment rights reduces the possibility of a narrowly drawn order, and substantially imperils the protection which the Amendment seeks to assure. 393 U.S. at 183-84.

Nor does the prospect of expedited appellate or *de novo* review of an *ex parte* order salvage the damage to First Amendment rights. In *Carroll,* respondents had argued that petitioners had available to them a full adversary hearing on the *ex parte* order within two days of issuance of the order. This Court found two days to be too much "in view of the First Amendment's imperative." 393 U.S. at 184. The Court went on to say:

> The denial of a basic procedural right in these circumstances is not excused by the availability of a post-issuance procedure which could not possibly serve to rescue the August 7 meeting, but at best, could have shortened the period in which petitioners were prevented from holding a rally. *Ibid.*

The stakes involved in a public employee labor dispute, in which political issues are frequently paramount, are no less significant.

> As soon as you require unions and workers to obey a court order, you have in all likelihood effectively broken the strike, and without there having been an opportunity for the merits of the controversy to be heard. Watt, *The Divine Right of Government by Judiciary,* 14 U. Chi. L. Rev. 409, 443 (1947). *Accord,* C. Summers and H. Wellington, *Cases on Labor Law* 163-68 (1968).

Indeed, there is some tension between the disdain shown by the Court in *Carroll* for expedited review procedure and the general rule of *Walker* requiring appeal rather than disobedience. How is the rule of *Carroll* to be enforced against recalcitrant state officials? Political expedience dictates that results are most easily achieved through *ex parte* proceedings. If such proceedings are later held unconstitutional, no matter—exercise of First Amendment rights has been effectively abridged and the political crisis has passed. There is no sanction.

This Court must evaluate the relation of *Carroll* to *Walker.* Permitting disobedience of injunctions where state officials have abrogated their clear constitutional duty as

expressed in *Carroll* to make reasonable efforts to give notice of injunction proceedings will open no floodgates of disrespect for the courts. Rather, such a rule would compel lower courts to accord all parties "a basic procedural right" in the resolution of their disputes. It would create better law in the courts of first instance and would increase respect for the judicial system. If judicial orders are to be accorded respect superior to that of statutes and the orders of law enforcement officers, then this Court must insure that those orders are worthy of that greater respect.

Finally, it must be underscored that these petitioners are faced with jail and all that a criminal conviction implies. They are being punished for their contempt for a court order issued in flagrant disregard for a perfectly clear-cut constitutional mandate. One must ask whether their contempt is deserved in this instance. No state interest even arguably legitimate was served in the failure to give petitioners notice of the injunction proceeding. The only purpose of such a procedure was to avoid the constitutionally mandated adversary hearing and thereby to corrupt the institutions of justice. For this petitioners are not the parties deserving of this Court's censure.

II.

Applying *Walker* to persons whose speech and conduct may arguably be proscribed by an unconstitutionally vague injunction will foster unnecessary litigation, discredit lower state courts, and chill speech.

Not only was the injunction of January 31 obtained in flagrant violation of *Carroll,* but it was subsequently applied in criminal contempt proceedings to an unusually and unconstitutionally broad range of speech and conduct by an overly broad class of people. This substantive objection to the injunction, detailed in parts I and II (pp. 13-29) of the *Petition for Writ of Certiorari,* is equally significant to a determination of whether any or all the petitioners have foreclosed their right to challenge the substantive validity of the order by not appealing before violating it.

Past injunctions have been as broad, but never has this Court been presented with a case in which such an injunction has been so broadly enforced with criminal convictions and jail, both as to classes of defendants and as to types of speech and conduct. *Petition* at 14-17. The procedural effect of such an overreaching order is that many petitioners could not have foreseen that the speech and/or conduct they had set out for themselves would be covered by the injunction. Thus, these petitioners could not have seen the need for appealing the order and, in fact, could have determined with the best of legal advice that had they appealed the order, their appeals would have been dismissed for lack of standing. Thus, for many, the only way to bring the illegality of the order to the scrutiny of judicial review was to engage in speech activities which

could or could not be held by a trial court to violate the order.

It is conceded that the injunction was at least intended to prevent a strike and that a handful of petitioners were named in the injunction. But even those named were forbidden from such remote activities as "loitering" and "gathering . . . in the vicinity of . . . premises of the plaintiff." Thus, one named in the injunction could be arrested for merely being in the proximity of the Newark City Hall (attached to the Board of Education administrative office) whatever his purpose in being there. Efforts to leaflet near City Hall merely to inform the public of the grievance could be punished with jail.

As for those not named in the order, petitioners include a large number of rank and file union members; a retired teacher, Mrs. Alice Saltman; a non-union striking teacher, Miss Joan Stevens; and a sympathizer who was neither a union member or a Newark teacher, Mr. Jerry Meyer. Had these, persons, especially those not members of the union, wished to challenge the illegality of the injunction, it is highly unlikely they would have been granted standing to appeal, given their lack of relationship to the parties named in the order. Nor is there reason for an appellate court to assume that the injunction would be enforced against these petitioners or against First Amendment protected activity. Indeed, to so assume would undercut the integrity of the lower courts of New Jersey and foster time-consuming litigation by all parties in and around Newark who sympathized with the union to determine whether they and their proposed speech or other supportive activity or non-activity was to be covered by the ban. Surely this is not the result envisioned by the rule in

Walker, nor could it be the result were lower courts effectively required to fashion narrower orders.

The charging of Mr. Bayard Rustin with contempt for his speech to a union rally February 8 is significant, even though he was not convicted, for its symbolic impact in chilling speech and association in connection with the union's grievances. That the injunction could be interpreted so broadly by law enforcement officials is a clear indication of its constitutional infirmity. The State did not need to convict Mr. Rustin to achieve its dampening objective. Thus many persons, as unconnected with the union as Mr. Rustin, engaging or planning to engage in speech activities as remote from parading, picketing, and striking as those of Mr. Rustin, could be censored from speaking on the highly political issues in the strike and from associating with union members. They would know from the arrest and from the standard implied in *Walker* that they too could be convicted of contempt, regardless of the unconstitutionality and bad faith of the injunction.

Thus, to apply the general rule of *Walker* to an injunction which runs so far afoul of First Amendment and Due Process concepts of overbreadth is to have substantial deleterious impact on the exercise of protected First Amendment freedoms and to create unreasonable obligations on ordinary citizens, unconnected with the principals in a public employee labor dispute, to affirmatively litigate their right to speak on that public issue. This Court must meet these issues if the integrity of the lower state courts is to be protected and the individual's right to speak is to be maximized.

Although we urge the issue of overbreadth as a separate and distinct argument for permitting petitioners to be heard on the substantive constitutionality of the injunction,

it is clear that this point is also in some sense related to our first argument based upon *Carroll*. Without the *ex parte* procedure at the start, the issuing court would have been far less likely to have framed an order so patently violative of First Amendment rights. If the lower courts could be made to follow constitutional guidelines in their procedures for issuing injunctions, there would be less reason to violate those orders to test their constitutionality. The injunction in this case, however, bears all the infirmities, substantive and procedural, of an unconstitutionally overbroad statute. To require that such an overbroad order, issued *ex parte*, be obeyed by all persons who could conceivably be covered by it and challenged only through the mechanism of appellate review is to ignore the realities of this particular breed of judicial order.

CONCLUSION

Because this case raises important areas of tension between the decisions of this Court in *Carroll* and *Walker*, and because important areas of First Amendment activity and the effective functioning of lower state courts stand to be severely impaired, *amicus curiae* respectfully requests this Court to grant the *Petition for Writ of Certiorari*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. A-54

71 - 230

NEWARK TEACHERS UNION, etc., *et al.*,
Petitioners,

v.

THE BOARD OF EDUCATION OF NEWARK, etc.,
Respondent.

IN THE MATTER
of
NEWARK TEACHERS UNION, LOCAL 481, etc., and ONE HUNDRED EIGHTY-FIVE (185) OTHERS, Charged with Contempt of Court,
Petitioners.

IN THE MATTER
of
JOAN STEVENS, Charged with Contempt of Court,
Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Statement of the Case

Petitioners seek a writ of certiorari to review judgments entered in the Appellate Division of the Superior Court of New Jersey on April 5, 1971, affirming petitioners' convictions in summary criminal contempt proceedings conducted by the Chancery Division of the Superior Court of New Jersey. (One of the two Appellate Division decisions is reported at 114 N. J. Super. 306). On July 7, 1971, the Supreme Court of New Jersey denied certification. 58 N. J. 603. On July 23, 1971, Mr. Justice Brennan ordered a stay of the execution of the judgments pending the disposition of the present Petition.

Petitioners' convictions arose out of their participation in an illegal strike called by the Newark Teachers Union in February, 1970. Prior to that date, the Union had been involved in negotiations with the Newark Board of Education concerning a new teachers' contract.

On December 12, 1969, the Newark Board of Education, through its Negotiating Committee, met with the Union and its representatives and agreed upon ground rules for negotiating a new teachers' contract.

On December 30, 1969, the Union delivered to the Board's Negotiating Committee its proposals, and a tentative schedule was agreed upon for the purpose of negotiations. The first negotiation meeting was held on January 5, 1970. At the meetings of December 30, and January 5, the Negotiating Committee apprised the Union and its representatives that, pursuant to N.J.S. 18A:22-7, the Board of Education's budget had to be submitted to the Board of School Estimate of the Newark school district on or before February 1, 1970, and to that end suggested that the provisions of the proposed contract relating to

budgetary matters be given priority, in order that the budget could reflect agreement between the parties. The Union rejected this suggestion.

The negotiations proceeded on a daily basis, with the total number of hours spent in negotiations, as of January 29, 1970, exceeding two hundred.

On or about January 16, 1970, the negotiator for the Union indicated that, with the February 1, 1970, deadline approaching, the policy and position of the Union would be that on January 31, 1970, if there were no contract, there would be no work. The Union issued a press release to that effect.

Subsequent to January 16, 1970, the Union actively proceeded to organize and make preparations for a strike on the first school day following the adoption of the actual budget. To this end the Union issued circulars entitled "Mass Teacher Demonstration," "Strike Instructions," and "Strike Information."

On January 31, 1970, the Board of Education, at a duly constituted public meeting, adopted a budget for 1970-71. Included in this budget was a new policy and salary guide, increasing the minimum salary of first year teachers from $6,700 to $8,000, in addition to the normal increment of $400,—a raise of $1,300 for each teacher. The Union negotiating representatives rejected the above salary and benefits proposal and indicated that at the Union meeting on February 1, 1970, they would not recommend to the membership acceptance of the new salary and benefits reflected in the budget for the year 1970-71.

Fearing the imminent threat of immediate, substantial and irreparable injury to itself, to the Newark school system, to the pupils who attended the Newark public

schools and to the public, the Board of Education applied to the Chancery Division for temporary relief. On January 31, 1970, the Chancery Division entered an order restraining the strike.

In its application for injunctive relief, the Board set forth the fact that a strike would cause irreparable, immediate and substantial injury, before notice of application for a temporary restraint could be served and a hearing had thereon. More specifically, it was alleged that if a substantial number of teachers went out on strike, the Board would be unable to obtain a sufficient number of qualified teachers to keep the schools open. If the schools could not be kept open, many children would be without adequate care and supervision during school hours, since both parents in many cases were employed. Many children would not be able to obtain lunch from the school cafeteria and many would suffer educational retrogression. Moreover, the Board stated that many children would suffer from the damaging psychological impact the strike would have. Finally, the entire City of Newark would suffer a severe setback from a strike affecting the City's school system.

The Restraining Order of January 31, 1970, applied to the Union, the New Jersey State Federation of Teachers, their respective members, officers, directors, committee members, employees, agents, and representatives, certain named Union officers, and all persons acting in behalf of or in concert with the above. The order prohibited the above-enumerated persons from:

> (a) causing . . ., etc. any strike against the Newark Board of Education;
>
> (b) picketing . . ., etc. in the vicinity of any of the public schools or other Board of Education buildings;

(c) Doing any act to interfere . . ., etc. with the construction of any building of the Board of Education;

(d) Agreeing, conspiring, or combining to do any of the above acts.

The Restraining Order of January 31, 1970, provided that those enjoined (petitioners herein) could move for dissolution or modification of the restraints on two days' notice. At no time did anyone ever move to dissolve or modify the restraints.

The Union and its representatives held a meeting on February 1, 1970, to call for a strike vote pursuant to a notice entitled "Strike Vote Meeting". The meeting was held on that date, a Sunday, and on Monday, February 2, 1970, the teachers' strike commenced amidst a great deal of publicity in the local and New York press.

The strike continued and on February 4 and 5, 1970, the Chancery Division issued Orders to Arrest six of the officers of the local Union for their violations of the Restraining Order of January 31, 1970. Each Order to Arrest specified the charges against each defendant and also specified a date for his hearing.

On February 6, 1970, the Chancery Division issued an Order directing the Essex County Prosecutor to investigate the strike and counsel the Court. The Order specifically directed the Prosecutor to investigate the conduct of the strike for the purpose of ascertaining and presenting facts relating to the identity of the individuals who violated the Restraining Order, and the nature of their conduct in committing such violations. The stated purpose of the Order of February 6, was to provide that contempt proceedings be instituted against those violating the Restraining Order.

Nevertheless, the strike continued on February 6, and February 9, drawing extensive coverage in the news media.

On February 10, 1970, the Chancery Division, relying upon affidavits submitted, issued an Order directing the Essex County Sheriff and his designated representatives, under the supervision of the Essex County Prosecutor, to arrest any individual who in their presence was observed to violate the Restraining Order of January 31.

The affidavits alleged a concerted, coordinated effort on the part of the strikers and pickets to avoid identification by law enforcement officers. Arrests of strikers and pickets were made on February 11, 13, 17, 18, 19 and 20. Approximately one hundred and ninety persons were arrested during this period. Each of the persons arrested was served with an Order continuing his arrest, setting bail and charging him with contempt of court for violation of the Restraining Order. These individual Orders enumerated the charges against each defendant and specified these charges as follows:

(a) striking, etc.

(b) picketing, etc.

(c) interfering, etc. with the Newark Board of Education in the performance of its duties.

Hearing dates for the contempt proceedings were set forth in each Order.

As a supplementary procedure each person arrested was served with a complaint by the Sheriff's Department. These complaints alleged contempt of court for violation of the Restraining Order in that the person named:

(a) assembled with others and picketed;

(b) refused to comply with the terms of the Restraining Order.

The petitioners were tried in groups in summary contempt proceedings. The evidence produced by the State at each trial was substantially the same for the vast majority of the petitioners. The State introduced into evidence the Restraining Order of January 31, the Arrest Orders of February 4 and 5, the Arrest Order of February 10, and the Orders charging each petitioner with specific acts of contempt. The State introduced numerous newspaper articles from both the Newark and New York press to show the extensive coverage given to the strike and the widespread dissemination of notice of the strike and of the Restraining Order throughout the community. Testimony was produced relating to the Union meetings of February 1, and February 8, 1970, at which times the Restraining Order was mentioned by several speakers. There was oral testimony placing many of the petitioners at one or both of these meetings. Members of the Sheriff's Department testified that they served copies of the Restraining Order on local Union leaders by leaving the copies at their homes. There was also testimony as to the arrest of several Union leaders prior to February 11, 1970. The Superintendent of Schools testified generally as to the number of teachers absent throughout the school system from February 2 through February 25, while the principal or vice-principal of each school involved testified as to the specific absences of each petitioner from school throughout the course of the strike. The State put into evidence Section 515.1 of the Board of Education Rules which provides that "teachers prevented from attending school shall immediately notify the principal." The principal or vice-principal of each

school also testified as to the posting of the Restraining Order on the bulletin board in each school. There was substantial testimony identifying various petitioners as being on picket lines on specific dates, as well as photographs depicting numerous petitioners picketing at various schools and the Board of Education building, and showing petitioners being handed copies of the Restraining Order. There was evidence of many of the petitioners carrying or wearing signs bearing messages in furtherance of the strike. Finally, the State produced oral testimony of the substance of the Restraining Order being read to the pickets on many of the dates in question.

All of the petitioners were convicted of contempt of court.

How Federal Questions Were Presented

Several of the federal questions herein presented were not properly presented below.

At the trial level one teacher, Joan Stevens, was represented by her own counsel while the Union and the other 185 individuals were represented by a different attorney. Two separate appeals were taken to the Appellate Division of the Superior Court. Several issues were raised in Joan Stevens' appeal that were not raised in the NTU (Newark Teachers Union) appeal. Similarly, issues were raised in the NTU appeal which were not raised in the Stevens appeal. The Appellate Division rendered two separate opinions which, accordingly, dealt with the different issues raised in each case.

After the Appellate Division decisions were handed down, petitioners' present counsel were substituted as counsel for the NTU and the 185 individuals. Apparent-

ly, present counsel were also substituted as counsel for Joan Stevens, although no formal substitution of attorney can be located. A single Petition for Certification was filed in the Supreme Court of New Jersey under a single docket number. This petition bore separate captions for Joan Stevens and for the NTU and the 185 individuals. Apparently, no formal motion to consolidate the two cases was ever made. The Supreme Court of New Jersey denied the joint petition for certification. The separate captions were retained in the Petition for Stay. Petitioners then petitioned this Court for a writ of certiorari. At this juncture and for the first time the separate captions are deleted.

Petitioners contend (on page 11 of their Petition) that the questions of the alleged overbreadth and vagueness of the injunction were raised before the Appellate Division and decided. Respondent submits that this issue was never properly framed in the NTU brief, nor was this issue dealt with in the Appellate Division opinion in the NTU case.

It is uncontroverted that the applicability of *Walker* v. *City of Birmingham,* 388 U. S. 307 (1967), was not raised, argued or decided in the NTU Appellate Division case.

Petitioners contend (at page 12 of their petition) that the question of the failure to give notice of the issuance of the *ex parte* restraining order was "inherent" in the Appellate Division brief of Joan Stevens, and that the Appellate Division "apparently" focused on this issue. Respondent submits that this issue was not raised in the Joan Stevens brief, nor was it dealt with in the Appellate Division opinion in that case. Moreover, it is uncontroverted that this notice question was not raised, argued or decided in the NTU Appellate Division case.

The issue of the constitutionality of the common law prohibition against strikes by public employees (embodied in the New Jersey Constitution) was first raised in the Petition for Certification to the Supreme Court of New Jersey. (Petitioners conceded this fact at pages *ii-iii* of their Petition for Certification). The more specific First Amendment attack on the "common law rule of New Jersey" is now raised for the first time in the Petition to this Court for writ of certiorari.

REASONS FOR DENYING THIS WRIT

I

Several of the federal questions presented herein were either not presented below or were not properly presented.

It is essential to the jurisdiction of this Court under 28 U.S.C. §1257 that a substantial federal question have been properly raised in the state court proceeding below. See Wiener, "Wanna Make a Federal Case Out of It?" 48 A.B.A.J. 59, 60, 62 (1962). There are two basic requirements of particularity in the proper framing of a federal question. First, the question must make reference to a particular clause of the federal Constitution relied upon, as well as the rights claimed thereunder. Second, the jurisdiction of this Court cannot arise from mere inference but only from averments so distinct and positive as to place it beyond question that a party intended to assert a federal right. *Oxley Stove Company* v. *Butler County,* 166 U. S. 648, 655 (1897). Several of the questions petitioners attempt to raise have not met these standards. (See "How Federal Questions Were Presented," *supra*).

Once a substantial federal question has been properly framed, it becomes important that it be raised at the proper point in the state court proceeding. *Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 181 (1919); *Beck* v. *Washington*, 369 U. S. 541, 550 (1962). "The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional." *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U. S. 308, 334 (1968) (dissent).[1] This factor is especially significant where, as here, the highest state court has failed or refused to pass expressly upon the federal questions. In this situation, the petitioners have the burden of showing that they properly raised the questions, so that the state court's failure to deal with them was not for want of proper presentation. As Rule 23(1)(f) of this Court states, a petitioner seeking review of a state court decision must "specify the stage in the proceedings in the court of first instance and in the appellate court at which, and the manner in which, the federal questions sought to be reviewed were raised. . . ."

"A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power." *Williams* v. *Georgia*, 349 U. S. 375, 382-3 (1955). See *Hulbert* v. *Chicago*, 202 U. S. 275 (1906) (complete failure to raise question at trial court level); *Brown* v. *Massachusetts*, 144 U. S. 573, 580 (1892) (failure to raise question before verdict held to be fatal); *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226,

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[1] In *Cardinale* v. *Louisiana*, 394 U. S. 437, 439 (1969), the Court listed various "sound reasons," in addition to a want of jurisdiction, for ignoring federal constitutional issues not raised, preserved, or passed upon in the state courts below.

231-2 (1897) (proper to raise question in motion for new trial); *Edelman* v. *California,* 344 U. S. 357 (1953) (failure to raise issue at trial). Thus a state "may attach reasonable time limitations to the assertion of federal constitutional rights," and such limitations must be respected. *Michel* v. *Louisiana,* 350 U. S. 91, 97 (1955). In *Beck* v. *Washington,* 369 U. S. 541, 550, this Court recognized the reasonableness of a state supreme court's refusal "to consider constitutional attacks upon statutes not made in the trial court even where the constitutional claims arise from the trial court's interpretation of the challenged statute."

If, as here, reasonable state procedural requirements are not observed, this Court should decline to exercise jurisdiction where the highest state court is completely silent on the federal question *Mutual Life Ins. Co.* v. *McGrew,* 188 U. S. 291, 309 (1903). This Court must assume, unless it can affirmatively be shown otherwise, that the silence is due to the procedural deficiency. *Bailey* v. *Anderson,* 326 U. S. 203, 206-7 (1945).

It has also been held that where the federal constitutional issue was not raised in the trial court, as required by state law, but was raised for the first time in a petition for rehearing addressed to the state intermediate court, the highest state court's action in refusing without opinion to hear the case precludes review on certiorari by the Supreme Court. *Stembridge* v. *Georgia,* 343 U. S. 541, 547 (1952). But cf. *Cicenia* v. *Lagay,* 357 U. S. 504, 507-8 (1958), n. 2. Such refusal by the highest state court *might* have been based upon the adequate state ground that the constitutional issue was not raised in the trial court, as required. And this Court is without jurisdiction "when the question of the existence of an adequate state ground is debatable." 343 U. S. 547-8.

Here, the question of the constitutionality of the common law rule prohibiting public employee strikes was initially raised in a Petition for Certification filed in the highest state court, which court refused to consider the case. Respondent submits that the jurisdiction of this Court cannot attach. *Bailey* v. *Anderson,* 326 U. S. 203, 206-7 (1945). Only if the highest state court actually considers and disposes of a question so raised can this Court's review be obtained. But cf. *O'Connor* v. *Ohio,* 385 U. S. 92, 93 (1966).

II

The decisions below, involving ordinary criminal contempt proceedings, are predicated on the well-settled principle that the State's right to prohibit strikes by public employees is not violative of the petitioners' rights under the First and Fourteenth Amendments, and these decisions present no substantial federal question.

It is clear that in New Jersey, as in most other states, public employees, including teachers, do not have the right to strike against the government, whether federal, state or a political subdivision of the state. *Board of Education* v. *New Jersey Education Ass'n., et al.,* 53 N. J. 29, 247 A. 2d 867 (1968); *In re Block,* 50 N. J. 494 (1967). See also *Delaware River Authority* v. *International Organization of Masters, Mates and Pilots,* 45 N. J. 138, 211 A. 2d 789 (1965); *Donevero* v. *Jersey City Incinerator Authority,* 75 N. J. Super. 217, 182 A. 2d 596 (Law Div. 1962), rev'd on other grounds; *McAleer* v. *New Jersey Incinerator Authority,* 79 N. J. Super. 142, 190 A. 2d 891 (App. Div. 1963); *New Jersey Turnpike Authority* v. *America. Federation of State Employees,* 83 N. J. Super. 389, 200 A. 2d 134 (Ch. Div. 1964).

A right to strike need not necessarily be an inherent element of the right to organize, and the New Jersey courts have recognized the distinction between public and private employment. *Board of Education* v. *New Jersey Education Ass'n. et al., supra.* Article 1, para. 19, of the New Jersey Constitution, adopted in 1947, provides:

> Persons in *private employment* shall have the right to organize and *bargain collectively.* Persons in *public* employment shall have the *right to organize,* present to and make known to the State or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing (Emphasis supplied.)

Thus, the legislature recognized the legitimate distinction between public and private employment, and the courts (which have the responsibility of interpreting the New Jersey Constitution) cannot infer from this provision that the Legislature intended to depart from the common law rule that strikes by public employees are illegal. *Board of Education* v. *New Jersey Education Ass'n et al., supra,* at 46, 247 A. 2d at 876; *Donevero* v. *Jersey City Incinerator Authority, supra,* at 224, 182 A. 2d at 600, where the New Jersey Supreme Court in interpreting that section of the New Jersey Constitution held:

> This provision does not, in terms, confer any right on the part of public employees to strike. It was clearly the understanding and intention of the Constitutional Convention, which drafted the basic State Charter, that no such right to strike on the part of public employees was to be implied from the language used. In this respect, the then existing state of the law was not to be altered. See: *1 Proceedings of the New Jersey Constitutional Convention of 1947,* p. 661.

See also, *Kirker* v. *Moore,* 308 F. Supp. 615 (S. D. W. Va. 1970).

Clearly, the Legislature sought to make this distinction in the respective rights of private and public employees by not giving the latter the right to bargain collectively. It is well settled that the concept of collective bargaining includes the right to strike and other aspects of the private employer-employee relationship. See *Railway Mail Association* v. *Cordi,* 293 N. Y. 315, 56 N. E. 2d 721 (1944), aff'd 326 U. S. 88 (1945); *Delaware River Authority* v. *International Organization of Masters, etc., supra,* at 147-48, 211 A. 2d at 794; *New Jersey Turnpike Authority* v. *American Federation of State Employees, supra,* at 398, 200 A. 2d at 138-39. There is no constitutional prohibition preventing teachers from organizing under the banner of the Newark Teachers Union for the purpose of collective action in the presentation of grievances and proposals. They may not, however, achieve that end by coercive methods such as strikes, which would unlawfully halt the operation of the schools and adversely affect the public health, safety, and welfare. No constitutional issue is raised by this interpretation of the New Jersey Constitution.

The right of free speech is constitutionally subject to limitation by legitimate interests of the state which require such action. *Thornhill* v. *Alabama,* 310 U. S. 88, 104-06 (1940). It is clear that the Legislature, acting under police powers, may prohibit strikes in certain fields of endeavor when the interests of public health, safety, and welfare are involved. Teachers, as public employees, in whose services the State has an appreciable interest, do not have the constitutional right to strike. See *Jefferson City Teachers Association* v. *Board of Education,* 463 S. W. 2d 627 (Ky. Ct. of App. 1971); *Head* v. *Special School*

District No. One, et al., 182 N. W. 2d 887 (Minn. Sup. Ct. 1970); *Rankin* v. *Shanker,* 23 N. Y. 2d 111, 295 N. Y. S. 2d 625, 242 N. E. 2d 802 (Ct. App. 1968); *Minneapolis Federation of Teachers* v. *Obermeyer,* 275 Minn. 347, 147 N. W. 2d 358 (1966); *Pawtucket* v. *Parent Teacher's Alliance,* 87 R. I. 364, 141 A. 2d 624 (R. I. Sup. Ct. 1958); *Norwalk Teachers Association* v. *Board of Education,* 138 *Conn.* 269, 83 A. 2d 482 (1951). Thus, conduct which would otherwise be constitutionally permissible in the private employment sector can constitutionally be prohibited in the public employment sector as inconsistent with the public interest in the valid exercise of the State's police power.[2]

The fact that petitioners merely allege that their activity was protected by the First Amendment does not give rise to a First Amendment question where the activity was in violation of a valid state law. *Giboney* v. *Empire Storage Co.,* 336 U. S. 490 (1948). In the *Giboney* case, the court held that members of a labor union were properly enjoined from picketing in violation of a state law, even though the picketing involved dissemination of truthful information about a labor dispute. The court reasoned at 502:

> (I)t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed. See

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[2] As petitioners note on page 14 of their Petition, "in a number of cases presented to this Court, petitions for writs of certiorari have been denied in cases involving contempt citations arising out of public employee strikes." For a list of these recent cases, see footnote 4 on page 14 of the Petition.

Fox v. *Washington,* 236 U. S. 273, 277 (1915); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942).

See also *International Brotherhood, etc.* v. *Vogt, Inc.,* 354 U. S. 284 (1957).

That the legitimate distinction between public and private employment is constitutionally permissible is clear from the abundance of case law and statutes prohibiting strikes by public employees. Even where states have enacted anti-injunction laws to prevent abuses resulting from the use of injunctions in labor disputes, these laws have been held not to be applicable to disputes between the state or any political subdivision and its own employees. *United States* v. *United Mine Workers,* 330 U. S. 258, 272 (1947); *N. J. Turnpike Authority* v. *American Federation of State Employees,* 83 N. J. Super. 389; *Delaware River and Bay Authority* v. *International Organization of Masters, Mates and Pilots,* 45 N. J. 138.

Petitioners contend that the imposition of jail sentences upon conviction of contempt of court is designed to "chill" or "freeze" the exercise by public employees of their right, under the First Amendment, to associate in and support a union. The State of New Jersey and its courts have no such desire. Unions long ago achieved in our State a status of recognition and respect. Indeed, New Jersey law forbids the issuance of restraining orders or injunctions against peaceful activities by non-public employees and unions involved in labor disputes. N.J.S. 2A:15-51. The meting out of jail sentences to petitioners in the instant case cannot be said, then, to be a manifestation of either an anti-union policy or an attempt to "chill" First Amendment rights. Rather, the trial court was imposing a constitutionally permitted punishment for the contempt of

court committed by petitioners in refusing to obey the court's Restraining Order.

In New Jersey, punishment in a summary prosecution for contempt may not exceed six months' imprisonment or a fine of $1000.00, or both, subject to statutory probation provisions. *New Jersey Constitution,* 1947, Art. 1, par. 8, 9; N.J.S. 2A.168-1, *et seq.* Petitioners have conceded that their sentences were within statutory limits. Underlying their argument, however, is the disturbing theme that the violations which were the subjects of the immediate prosecutions were minor or petty in nature and that, when weighed against petitioners' First Amendment rights, the State's interest in preventing such minor or petty misconduct does not warrant the imposition of custodial sentences, no matter how minimal.

Respondent is constrained to disagree. The 1970 strike and the picketing by Newark teachers was the third in a series of labor disputes involving the Newark school system. The leniency of the courts in the past and their failure to impose custodial sentences apparently served to encourage the Union rather than to deter the contemplated strike. The strike that did occur caused serious disruption in the educational process of countless youths in the City of Newark. The fact that teachers, who are the closest representatives of government in the minds of our school children, violated with impunity court orders and statutes, makes their conduct all the more serious and objectionable. Our courts cannot continue to countenance such a public display of disregard for the law.

The fact that petitioners were convicted in summary contempt prosecutions in no way detracts from the seriousness of their transgressions against the law of New Jersey. As noted by this Court in *United States* v. *United Mineworkers,* 330 U. S. 258, 302 (1947):

> Sentences for criminal contempt are punitive in their nature and are imposed for vindicating the authority of the Court. (Citations omitted). In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge.

Incarceration for the willful defiance of a court order is not novel in New Jersey. See *In re Buehrer,* 50 N. J. 501, 512-13 (1967); *In re Block,* 50 N. J. 494, 499 (1967); *Whippany Paperboard Co., Inc.* v. *Local 301,* 11 N. J. 153, 156 (1952). History has revealed that less punitive measures create disrespect for the law and encourage those persons similarly disposed to criminal conduct.

Here, rank and file members of the Union are among those involved. This does not detract from the seriousness of their antisocial conduct. Our system of law is based upon the proposition that men and women are free agents, responsible and, in the final analysis, accountable, to those whose rights they transgress. The members of the Union selected their leaders and chose to follow their orders. They helped mold the policies of the Union and in fact supported them with full knowledge of the consequences. That being the case, they are hardly in a position to complain.

The thrust of petitioners' argument is that, the illegality of their conduct notwithstanding, imprisonment is too

drastic a penalty and is thus somehow constitutionally impermissible. Neither *United States* v. *Robel*, 389 U. S. 258 (1967), *Smith* v. *California*, 361 U. S. 147 (1959), nor *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964), relied on by petitioners, supports such a proposition. In each of the three cases the Court's holding that the strictures of the statute involved were too drastic was based on a finding that the statute was so broad as to "sweep indiscriminately," and thus run afoul of the First Amendment. Certainly none of these cases stands for the proposition that a statutorily permissible jail sentence for a contempt conviction violates the First Amendment rights of the person sentenced or of any other person. The term "chill" as referring to fragile First Amendment rights is a delicate term of art. *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). To punish criminal conduct is not necessarily to "chill;" if such were the case, all penal sanctions would be deemed "chilling."

Petitioners heavily rely upon the fact that their conduct was non-violent. Again, they fail to discern the seriousness of their acts. By their willful and deliberate defiance of the law, they contributed in the most direct terms to an atmosphere of lawlessness and violence. Damage to the public is no less real because it does not involve violent acts. The public is not a mere abstraction and the injury to it caused by petitioners' conduct cannot be disputed. In light of these considerations, the sentences imposed by the trial court were not improper.

III

Petitioners, having failed to move to dissolve or modify the injunction, may not, under the doctrine of *Walker v. City of Birmingham* and *United States v. United Mine Workers*, attack the constitutionality of said injunction in collateral contempt proceedings.

Petitioners contend that the Superior Court of New Jersey, Appellate Division, misapplied *Walker* v. *City of Birmingham*, 388 U. S. 307.[3] Respondent submits that the New Jersey courts correctly applied the doctrine of *Walker* and that petitioners, not having moved to dissolve or modify the injunction, are estopped from doing so in collateral contempt proceedings.

Petitioners' attempt to distinguish the New Jersey contempt procedure from that in *Walker*; no such distinction exists. It is well settled in New Jersey that a constitutional attack against an injunction is not available to a defendant as a defense in a collateral contempt proceeding. See *In re Carton*, 48 N. J. 9 (1966), 222 A. 2d 92. For other jurisdictions, see *Kasper* v. *Brittain*, 245 F. 2d 92, 96 (6th Cir. 1957); *Reich* v. *United States*, 239 F. 2d 134, 138 (1st Cir. 1956); *McLeod* v. *Majors*, 102 F. 2d 128 (5th Cir. 1939); *McAm* v. *New York Stock Exchange*, 80 F. 2d 211, 214 (2d Cir. 1935). Even an erroneous decree must be obeyed until it is set aside by orderly review. If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then the courts are impotent and the

[3] The Appellate Division reached the question of the applicability of *Walker* only in the *Joan Stevens* case, as the injunction itself was not attacked in the *N.T.U.* case at the Appellate Division level.

judicial power a mere mockery. *Gompers* v. *Bucks Stove Range Co.,* 221 U. S. 418, 450 (1911). An injunctive decree is executory and continuing as to the object to be obtained, and operates until vacated, modified or dissolved. *Western Union Telegraph Co.* v. *International Brotherhood,* 133 F. 2d 955, 957 (7th Cir. 1943). In *Howat* v. *Kansas,* 258 U. S. 181 (1922), this Court held that an injunction must be obeyed.

> however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.

Callous disregard for a court order cannot be tolerated. The case *sub judice* is, more than was *Walker,* one in which petitioners had ample opportunity to move against the injunction and no-strike rule which they attack here. Petitioners are teachers who presumably, from the first day they engaged in their profession, knew of their State's policy regarding strikes by public employees. We are not here dealing with persons violating an injunction against picketing in support of Negro efforts to secure long-overdue civil rights, as in *Walker.* In *Walker* there was no important principle of state policy, embodied in law, counterveiling defendants' First Amendment rights. If petitioners in *Walker* were to be denied the opportunity to attack the validity of the injunction in collateral contempt proceedings, *a fortiori* petitioners here ought not be per-

mitted to attack either the no-strike rule or the injunction, when they failed to move against the injunction in the issuing court and never, until their Petition for Stay, raised the question of the constitutionality of New Jersey's common-law rule against strikes by public employees. (See Point I, *supra*).

"Civilization involves subjection of force to reason, and the agency of this subjection is law." Pound, "The Future of Law," 47 *Yale L.J.* 1, 13 (1937).

Petitioners attempt to distinguish the present case from *Walker,* arguing that the rule of *Walker* cannot possibly apply to persons not named as parties to the injunction proceeding. Some of petitioners were named parties in the injunction proceeding. There is no dispute that all petitioners had actual notice of the injunction. It would have been physically impossible to name as a party every person who might participate in the illegal strike.

To permit the constitutional attack now urged by petitioners would encourage persons dissatisfied with a law or court order and with opportunity to attack the validity of same to determine for themselves what the law ought to be and act accordingly. See opinion of Mr. Justice Frankfurter (concurring) in *Mine Workers, supra,* 330 U. S. 258, 307. Mr. Justice Stewart observed in *Walker* that "in the fair administration of justice no man can be judge in his own case . . . . [R]espect for judical process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."

IV

Neither the common-law prohibition against public employee strikes in New Jersey nor the injunction issued *ex parte* in the case *sub judice* were violative of the First Amendment, and both are in accord with the decisions of this Court.

A. New Jersey law barring strikes by public employees is constitutionally valid.

Petitioners state that they "do not argue for an absolute right to strike" (Petition for Certiorari, at p. 25). They thus concede that the State may, in some instances, forbid strikes by public employees. They contend, however, that the common-law rule of New Jersey forbidding strikes under which the injunction in the instant case was granted, lacks precision and is, therefore, violative of the First Amendment.

Strikes by public employees are prohibited not only in New Jersey but in many other jurisdictions as well. *N. J. Turnpike Authority* v. *American, etc. Employees,* 83 N. J. Super. 389, 395, 200 A. 2d 134, 138 (Ch. Div. 1964); *Donevero* v. *Jersey City Incinerator Authority,* 75 N. J. Super. 217, 222, 182 A. 2d 596, 599 (Law Div. 1962); *McAleer* v. *Jersey City Incinerator Authority,* 79 N. J. Super. 142, 146, 190 A. 2d 891, 893 (App. Div. 1963); see also *Norwalk Teachers' Ass'n* v. *Board of Education,* 138 Conn. 269, 83 A. 2d 482 (Sup. Ct. Err. 1951); *City of Los Angeles Bldg. & C. Tr. Council,* 94 Cal. App. 2d 36, 210 P. 2d 305 (D. C. App. 1949), reaffirmed 109 Cal. App. 2d 81, 240 P. 2d 16 (D. C. App. 1952); *City of Manchester* v. *Manchester Teachers Guild,* 100 N. H. 507, 131 A. 2d 59 (Sup. Ct. 1957); *City of Alcoa* v. *International Broth. of Elec. Wkrs.,* 203 Tenn. 12, 308 S. W. 2d 476 (Sup. Ct.

1957); *City of Pawtucket* v. *Pawtucket Teachers' Alliance,* 87 R. I. 364, 141 A. 2d 624 (Sup. Ct. 1958); *Port of Seattle* v. *International Longshore & W. U.,* 52 Wash. 2d 317, 324 P. 2d 1099 (Sup. Ct. 1958); *Cornell, "Collective Bargaining by Public Employee Groups,"* 107 U. Pa. L. Rev. 43, 54 (1958); Note, *"Labor Relations in the Public Service,"* 75 *Harv. L. Rev.* 391, 407 (1961); Note, *"Union Activity in Public Employment,"* 55 *Colum. L. Rev.* 343, 358 (1955); Annot., *"Union Organization and Activities of Public Employees",* 31 A. L. R. 2d 1142 (1953).

Petitioners argue that the New Jersey rule is invalid as overbroad in that the "cases speak in absolutes in terms of the kind of public employees the strike ban encompasses" (Petition for Certiorari, at p. 21). In *In re William Block, et als,* 50 N. J. 494, 236 A. 2d 584 (1967), the New Jersey Supreme Court stated that "(W)hen government undertakes itself to meet a need, it necessarily decides the public interest requires the service, and its employees cannot reverse or frustrate that decision by a concerted refusal to meet that need." 50 N. J. at 499, 236 A. 2d at 592. Respondent submits that no New Jersey case has specifically held that the ban on strikes by public employees is applicable to every public employee without exception. The cases cited by petitioners all involve public employees employed in furnishing services clearly essential to the public. *In re William Block, et als, supra; Board of Education, Borough of Union Beach* v. *N.J.E.A. et al,* 53 N. J. 29, 247 A. 2d 867 (1968). It is not inconceivable that the New Jersey courts might find that particular public employees engaged in furnishing a service that could, by no stretch of the imagination, be deemed "essential," may legally withhold their services. We need not speculate what the New Jersey courts would do

with such a case, however; there are none who would argue (least of all petitioners) that public education is a non-essential governmental service. In any event, petitioners' argument that the rule of law is unconstitutionally imprecise because it applies to all public employees is unpersuasive. "Public employees" are a group not difficult to define. Certainly the mere size of the group of persons to which a rule of law is addressed is no constitutional impediment. It is, respondent submits, quite reasonable for a State to adopt a policy designed to insure the continuous flow to the people of the services for which they pay and which they are rightly due.

It should be noted that while the New Jersey courts have not yet failed to uphold the no-strike doctrine, it has been made clear that this doctrine, though deemed to flow from Article I, par. 19 of the 1947 New Jersey Constitution. is not constitutionally dictated. In *Board of Education, Borough of Union Beach* v. *N.J.E.A. et al, supra,* the New Jersey Supreme Court stated:

> It of course is essential to the constitutional promise of an ordered society that government shall be able to govern, and we may therefore assume the Legislature could not legislate the branches of government into idleness. Strikes do tend to bring government to a halt. Yet it need not follow that the Legislature could not find strikes to be tolerable within certain area and limits. As to a public service the Constitution does not expressly require to be furnished, the legislature, which may withdraw the service, may find some interruption should be permitted. And even where the Constitution requires a public service to be rendered, as in the case of free public schools, Art. VIII, § 4, para. 1, there may be room for legislative judgment as to

> what interruptions are compatible with the fulfillment of that mandate. (53 N. J. at 45, 247 A. 2d at 876).

Thus, the New Jersey rule against public employee strikes represents a valid policy of governmental self-defense which remains flexible and subject to sensible modification.

New Jersey having voiced a valid public policy of not permitting strikes by public employees, the courts of that State can constitutionally enforce that policy by granting injunctive relief where the rule is violated. In *International Brotherhood, etc.* v. *Vogt, Inc.*, 354 U. S. 284 (1957), Justice Frankfurter discussed the realization by the Court that "the broad pronouncements, but not the specific holding of *Thornhill* v. *Alabama*, 310 U. S. 88 (1940) had to yield 'to the impact of facts unforeseen . . .' Cases reached the Court in which a State had designed a remedy to meet a specific situation or to accomplish a particular social policy. These cases made manifest that picketing, even though 'peaceful', involved more than just communication of ideas and could not be immune from all state regulation." 354 U. S. at 289. *Giboney* v. *Empire Storage and Ice Co.*, 339 U. S. 460 (1949); *Hughes* v. *Superior Court*, 339 U. S. 460 (1949); *Intl. Brotherhood of Teamsters Union* v. *Hanke*, 339 U. S. 470 (1949). Justice Frankfurter continued:

> This series of cases, then established a broad field in which a state, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature, or its courts, could constitutionally enjoin peaceful picketing aimed at effectuation of that policy. 354 U. S. at 293.

The strike by petitioners was precisely that form of conduct which the Court held that a State might validly enjoin in *Vogt, supra; i.e.,* the strike aimed at the effectuation of the valid state policy of providing free public education. Petitioners have stated that they do not argue for an absolute right to strike. Yet such an absolute right is precisely what must logically follow if teachers are permitted to strike. For there are few, if any, public services more essential to the citizens of Newark, or any other city, than public education.

Petitioners further attack the New Jersey rule of law as overbroad in that "a wide range of group activity involving concerted employee efforts is deemed to be a strike or, if not a strike, nevertheless prohibited". Respondent is constrained to disagree. While the courts must, of necessity, enjoin activity other than a self-denoted "strike", it does not necessarily follow that the New Jersey Courts will sanction a "wide range" of impingement on First Amendment-protected activity. In *Board of Education, Borough of Union Beach* v. *N.J.E.A., et al, supra,* cited by petitioners, the New Jersey Supreme Court upheld an injunction against "coercive activity," *i.e.* sanctions against individual teachers for their refusal to participate in a mass-resignation campaign. In that case, too, the court was confronted with an argument that the bar to activity was too broad and, thus, violative of the First Amendment. The court rejected this contention, stating that:

> Individuals, severally or in association, of course have the right to denounce a public body, its officers, and its programs in the most searing terms, and even with a wide margin of error. See *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Garrison* v. *Loui-*

> *siana,* 379 U. S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964); *Rosenblatt* v. *Baer,* 383 U. S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966); *Ashton* v. *Kentucky,* 384 U. S. 195, 86 S. Ct. 1407, 16 L. Ed. 2d 469 (1966); *St. Amant* v. *Thompson,* 390 U. S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). Such condemnation may indeed be "coercive" and be intended to "compel" a public agency to bow to the wishes of the critics. It is the right of the individual and it serves equally the collective interest of society, thus to bring government before the bar of public opinion, thereby to alter its course.
>
> But although citizens, individually and in association, may thus seek to "coerce" a public body to their wish, there is no right to achieve that end by disabling the public body from acting at all. There is no right to "compel" government to change its ways by blocking the administration of the law until it yields. And this is all the trial court condemned. It is perfectly clear from its opinion that by "coercive activity" it meant the scheme of sanctions before it which was intended thus to disable the Board from performing at all by depriving it of necessary personnel. 53 N. J. at 40-41.

Thus, the New Jersey rule has not been aimed at prohibiting *any* sort of concerted employee efforts, but only those which are specifically violative of the no-strike rule of law. The *Union Beach* case is not reminiscent of the *Philadelphia Cordwainers* case as petitioners suggest but is, rather, a reaffirmation of the First Amendment rights of teachers, viewed in the perspective of a balancing of those rights with the rights of the public to the services which public school teachers have undertaken to provide.

Petitioners next argue that the rule of law is constitutionally unsound in that it does not permit defenses of excuse or justification. No authority is cited to indicate that excuse or justification are proper considerations for a trial court in determining whether violation of an injunction constitutes contempt of court which may be punished. Ordinarily, persons enjoined are bound at their peril to heed the mandate of an injunction until it is set aside by orderly judicial process. *Smotherman* v. *United States,* 186 F. 2d 676 (10th Cir. 1950). Petitioners have at no time suggested that it was impossible for them to honor the injunction. The trial court was under no obligation to hear, nor would it have been correct in considering, statements of petitioners as to why they felt they were justified in striking. Particularly since petitioners did not move to dissolve the injunction, they ought not be permitted to excuse or justify their violation of same. *Walker* v. *City of Birmingham,* 388 U. S. 307 (1967). See Point III, *supra.*

Finally, petitioners argue that New Jersey law does not "require the public employer to submit any proof to support its claim of irreparable injury." This statement is incorrect. Rule 4:52-1 of the Rules Governing Courts of the State of New Jersey, provides that an order to show cause "shall not, however, include any temporary restraints against the defendant unless he has either been given notice of the application or consents thereto or it appears from specific facts shown by affidavit or verified complaint that immediate and irreparable damage will probably result to the plaintiff before notice can be served or informally given and a hearing had thereon." The rule is clear: if there is no showing of irreparable injury, there may be no *ex parte* temporary restraint. It is equally clear that the courts of New Jersey do not lightly

issue injunctions. To authorize an injunction, the court must be reasonably satisfied that the threatened harm is likely to be committed and that defendant intends to perpetrate the act sought to be enjoined. *New Jersey State AFL-CIO* v. *State Federation of District Boards of Education,* 93 N. J. Super. 31, 224 A. 2d 519 (Ch. 1966). "Irreparable injury" sufficient to warrant an injunction is an injury which is material and for which pecuniary damages would not afford adequate compensation. *Union Beach, supra.* In the instant case a finding of impending, immediate, substantial and irreparable injury was made by the trial judge and embodied in the original Order to Show Cause and Interim Restraint. This case is therefore distinguishable from *School District for City of Holland, Ottawa and Allegon Counties* v. *Holland Educational Association,* 380 Mich. 314, 157 N. W. 2d 206, 210 (1968) cited by petitioners.

Thus New Jersey law, embodying a valid policy against strikes by public employees, is not constitutionally deficient.[4]

B. The injunction issued by the Superior Court of New Jersey, Chancery Division, was neither overbroad nor vague.

The Restraining Order issued by the Chancery Division was concededly broad in scope. Yet, not all union activities were banned. Nor were teachers enjoined from expressing their personal views concerning the situation or their opinions of the Newark Board of Education. Thus, the injunction was not designed to prevent expression of grievances by teachers or others. *Union Beach, supra.* Yet, petitioners contend that the injunction was overbroad and vague and must, therefore, fail.

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[4] See *United Federation of Postal Clerks* v. *Blount,* No. 70-328, decided by this Court on October 12, 1971.

Petitioners contrast the holdings of the New Jersey courts in the instant case with that of the California Supreme Court in *In re Berry*, 65 Cal. Rptr. 273 (1968). The latter case is, however, distinguishable on several grounds. In *Berry*, the injunction was not limited to the prohibition of a threatened and imminent strike, as in the instant case. "On the contrary, it also proscribe[d] a vast range of activities which the union and its supporters might properly utilize to voice and publicize their demands." Nothing in the injunction here under consideration prevented or was designed to prevent the union and its members from publicizing their demands. More significantly, *In Re Berry* was decided by a court in a state which does not have a rule of law prohibiting strikes by public employees. Even the California Supreme Court, without a no-strike rule, acknowledged that it might be appropriate under given circumstances to enjoin strikes of public employees. The thrust of *Berry*, then, lends little support to petitioners' argument.

Nor is the case at bar similar to *NAACP* v. *Button*, 371 U. S. 415 (1963). In *Button*, this Court, concerned with the prospective enforcement of a statute which appeared overbroad on its face, was properly unwilling to adopt a wait-and-see approach as to state court interpretation narrowing the parameters of the act's scope. In the instant case, this Court has before it the manner in which the New Jersey courts have interpreted and enforced, through contempt proceedings, the language of the Restraining Order. No one was found to have been in contempt for expressing an opinion, for "agreeing," for "encouraging," or for "sanctioning". "Legislative judgment" was indeed exercised by the trial court in this case. In at least one instance, a group of non-teachers who were charged with contempt had the charge against them dismissed.

Nor does the mere fact that many of the petitioners were not named in the injunction make the injunction over-broad or vague. In the emergency out of which this matter arose, there was not time to determine which teachers ought to be named as defendants. Additionally, petitioners do not contend that they were unaware of the existence of the Order or of its applicability to them.

Respondent submits that there was no potential for terror in the Restraining Order. Petitioners never moved to dissolve or modify the Order, notwithstanding a short notice provision (2 days) for so doing. They did not seek to have the injunction narrowed or interpreted. Whether or not their failure to act constituted a waiver (see Point III, *supra*), such conduct would tend to weaken petitioners' contention that terror lurked in the words of the injunction. No one was terrorized by the injunction, especially petitioners. The language of the injunction embodied the desire of the court to prevent illegal strike activity, not to censor or impose limitations or petitioners' rights of free speech and lawful assembly.

C. *Carroll v. President and Commissioners of Princess Anne* is distinguishable from the instant case.

In *Carroll* v. *President and Commissioners of Princess Anne,* 393 U. S. 175 (1968), this Court held invalid a 10-day restraining order issued by a Maryland Circuit Court, which order prevented a planned anti-Negro, anti-Semitic rally.

The Court stated:

> *There is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining*

> *orders of short duration;* but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders *where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.* (Emphasis added).

Here, unlike *Carroll, supra,* respondent set forth specific grounds militating against formal notification of petitioners prior to the issuance of the interim Restraining Order and the Court was fully satisfied that delay would cause immediate, irreparable injury to the public. The *Order to Show Cause* and *Interim Restraint* provided in pertinent part:

> This matter being opened to the court by Victor A. DeFilippo, attorney for plaintiff, and the Court having read the complaint filed herein and the affidavits attached thereto, and it appearing to the satisfaction of the Court that:
>
> A. A strike prohibited by law is being contemplated and is about to be voted upon by the defendant Newark Teachers Union, Local 481, American Federation of Teachers, A.F.L.-C.I.O., that the strike which is being contemplated is a strike by teachers and other public employees of the plaintiff, and that the said strike and picketing and other related acts in support of the strike are seriously threatened unless they are restrained;
>
> B. Immediate, substantial and irreparable injury and damage will result to and will be sustained by the plaintiff, the pupils in the public schools of the school district of Newark, New Jersey and to the general public of the City of Newark from the

said strike and from the said picketing and other related acts before notice of application for a temporary restraint or an interlocutory injunction pertaining to the said strike, picketing and other related acts can be served and a hearing had thereon;

C. The defendant, New Jersey Federation of Teachers has given its support for the said strike. The other defendants are officers of the defendant, Newark Teachers Union, Local 481, American Federation of Teachers, A.F.L.-C.I.O.;

D. Plaintiff has no adequate remedy at law.

Additionally, the court issuing the interim restraint afforded those enjoined the protection of a provision permitting them to move for dissolution or modification of the restraints on two days notice to respondent. Notwithstanding the existence of this protection, petitioners never moved to dissolve or modify the restraints. *Walker* v. *City of Birmingham,* 388 U. S. 307 (1967). Instead, they proceeded to violate the injunction and the law.

The instant case differs from the *Carroll* decision in another material and significant respect. The case *sub judice* involves a strike in violation of the State's law. The conduct sought to be restrained was a violation of the law *per se.*

Thus, *Carroll* is inapplicable to the facts in the case at bar. Petitioners were about to embark on a course of conduct that was patently illegal and there was a finding by the court that immediate and irreparable injury would result before notice could be given and a hearing held.

CONCLUSION

For the reasons set forth, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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